No. 16-605

Title:	Town of Chester, New York, Petitioner v. Laroe Estates, Inc.
Docketed:	November 3, 2016
Linked with 16A303	
Lower Ct:	United States Court of Appeals for the Second Circuit
Case Nos.:	(15-1086-cv)
Decision Date:	July 6, 2016

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Sep 22 2016	Application (16A303) to extend the time to file a petition for a writ of certiorari from October 4, 2016 to November 3, 2016, submitted to Justice Ginsburg.
Sep 23 2016	Application (16A303) granted by Justice Ginsburg extending the time to file until November 3, 2016.
Nov 3 2016	Petition for a writ of certiorari filed. (Response due December 5, 2016)
Nov 17 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioner.
Nov 22 2016	Order extending time to file response to petition to and including December 7, 2016.
Dec 2 2016	Brief amicus curiae of The International Municipal Lawyers Association filed.
Dec 5 2016	Brief of respondent Laroe Estates, Inc. in opposition filed.
Dec 20 2016	Reply of petitioner Town of Chester, New York filed.
Dec 21 2016	DISTRIBUTED for Conference of January 6, 2017.
Jan 9 2017	DISTRIBUTED for Conference of January 13, 2017.
Jan 13 2017	Petition GRANTED.
Feb 7 2017	Motion to be added as a respondent and for leave to participate in oral argument filed by Nancy Sherman, Executrix.
Feb 15 2017	Response to motion of Nancy Sherman, Executrix from counsel for respondent.
Feb 16 2017	Response to motion of Nancy Sherman, Executrix from counsel for petitioner.
Feb 17 2017	SET FOR ARGUMENT ON Monday, April 17, 2017
Feb 17 2017	Reply of Nancy Sherman, Executrix.
Feb 22 2017	Record requested from the U.S.C.A. 2nd Circuit.
Feb 24 2017	Joint appendix filed. (Statement of costs filed.)
Feb 24 2017	Brief of petitioner Town of Chester, New York filed.
Feb 27 2017	Record received from the U.S.C.A. 2nd Circuit. The record is electronic.
Feb 28 2017	Motion to be added as a respondent and for leave to participate in oral argument DENIED.
Mar 3 2017	Brief amicus curiae of United States filed.
Mar 3 2017	Brief amici curiae of National Association of Counties, et al. filed.
Mar 3 2017	Brief amicus curiae of Professor Aaron- Andrew P. Bruhl filed.
Mar 6 2017	Brief amicus curiae of Nancy Sherman, Executrix in support of neither party filed.

Mar 9 2017	Motion for reconsideration of motion to be added as a respondent and for leave to participate in oral argument filed by Nancy Sherman, Executrix.
Mar 10 2017	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 22 2017	CIRCULATED.
Mar 27 2017	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 27 2017	Motion of Nancy Sherman, Executrix, for reconsideration of motion to be added as a respondent and for leave to participate in oral argument DENIED.
Mar 27 2017	Brief of respondent Laroe Estates, Inc. filed. (Distributed)
Mar 31 2017	Brief amici curiae of National Association of Home Builders, et al. filed. (Distributed)
Apr 3 2017	Brief amici curiae of Constitutional Accountability Center, and Institute for Justice filed. (Distributed)
Apr 3 2017	Brief amici curiae of American Forest Resource Council, et al. filed. (Distributed)
Apr 10 2017	Reply of petitioner Town of Chester, New York filed. (Distributed)
Apr 17 2017	Argued. For petitioner: Neal K. Katyal, Washington, D. C.; and Sarah E. Harrington, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Shay Dvoretzky, Washington, D. C.
Jun 5 2017	Judgment VACATED and case REMANDED. Alito, J., delivered the opinion for a unanimous Court.
Jul 7 2017	JUDGMENT ISSUED.

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RECORD AND BRIEFS

16-605

No. 16-____

IN THE
Supreme Court of the United States

TOWN OF CHESTER,
Petitioner,

v.

LAROE ESTATES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether intervenors participating in a lawsuit as of right under Federal Rule of Civil Procedure 24(a) must have Article III standing (as three circuits have held), or whether Article III is satisfied so long as there is a valid case or controversy between the named parties (as seven circuits have held).

PARTIES TO THE PROCEEDING

Town of Chester, petitioner on review, was the defendant-appellee below.

The Town Board of the Town of Chester and the Planning Board of the Town of Chester are listed on the court of appeals docket as defendants-appellees, but the district court had dismissed the claims against them at the time of the appeal. The court of appeals subsequently amended the caption of the case to list only Town of Chester as the defendant-appellee.

Laroe Estates, Inc., respondent on review, was the movant-appellant below.

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IN THE

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TOWN OF CHESTER,
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LAROE ESTATES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

The Town of Chester respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's opinion (Pet. App. 1a-19a) is reported at 828 F.3d 60. The district court's opinion denying Laroe Estates, Inc.'s motion to intervene (Pet. App. 20a-59a) is not published in the *Federal Supplement*.

JURISDICTION

The judgment of the Second Circuit was entered on July 6, 2016. On September 23, 2016, Justice Ginsburg extended the time within which to file a petition

for a writ of certiorari to and including November 3, 2016. *See* No. 16A303. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Article III, Section 2, Clause 1 of the U.S. Constitution states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Federal Rule of Civil Procedure 24(a) provides:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
>
> (1) is given an unconditional right to intervene by a federal statute; or
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of

> the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

INTRODUCTION

This Court, on two separate occasions, has "reserv[ed] * * * for another day" the question whether an entity must have independent Article III standing to intervene as of right in federal civil litigation. *McConnell* v. *FEC*, 540 U.S. 93, 233 (2003), *overruled on other grounds by Citizens United* v. *FEC*, 558 U.S. 310 (2010) (citing *Diamond* v. *Charles*, 476 U.S. 54, 68-69 n.21 (1986)). The day to resolve that important and difficult question has come.

Almost every court of appeals in the country has weighed in on the issue—ten in total—and they are hopelessly divided. Three courts of appeals hold that intervenors as of right must have independent Article III standing (the Seventh, Eighth, and D.C. Circuits), and seven hold that they do not (the Second, Third, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits). *See* Pet. App. 7a-8a. Courts on both sides of the divide have reached or reaffirmed their respective positions within the past few years, and in the process, they have attempted to read between the lines of this Court's decisions acknowledging but not deciding the issue. This conflict should not be allowed to continue. Without resolution, identical requests for intervention will continue to meet different results based on nothing more than geography. This is not the way a coherent legal system should operate, particularly on a foundational gatekeeping question, and it is surely not what Congress

intended when it approved Rule 24. This Court should therefore grant the petition and clarify whether intervenors as of right must have independent Article III standing.

STATEMENT

A. Intervention In Civil Litigation.

Rule 24 of the Federal Rules of Civil Procedure provides a mechanism by which an outside entity may intervene in a case and thereby participate "as if [it] were an original party." 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1920 (3d ed. Apr. 2016 update). The Rule offers two different routes to intervention. Rule 24(a) provides for "intervention as of right": a court "must permit anyone to intervene" in a suit who either "(1) is given an unconditional right to intervene by a federal statute" or "(2) claims an interest relating to the property or transaction that is the subject of the action" that would be "impair[ed] or impede[d]" if intervention were not granted. Fed. R. Civ. P. 24(a). Rule 24(b) allows for "permissive intervention," stating that a court "may permit" a person to intervene whenever a statute gives that person "a conditional right to intervene," or when the person "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1); *see also* Fed. R. Civ. P. 24(b)(2) (authorizing permissive intervention by government officers and agencies in certain circumstances).

Once an entity is authorized to intervene in a suit, it acquires "equal standing with the original parties" and "is entitled to litigate fully on the merits." Wright, *supra*, § 1920. An intervenor can make

discovery requests, raise new claims, demand relief, withhold its consent for settlement, win attorney's fees, and exercise the numerous other privileges afforded to litigants in federal court. *See id.* §§ 1920-1921; *see also Local No. 93* v. *City of Cleveland*, 478 U.S. 501, 529-530 (1986) (discussing authority of intervenors to block settlement); *Bethune Plaza, Inc.* v. *Lumpkin*, 863 F.2d 525, 531 (7th Cir. 1988) (discussing authority of intervenors to demand separate relief and attorney's fees); *see generally South Carolina* v. *North Carolina*, 558 U.S. 256, 287-288 (2010) (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("Intervenors do not come alone—they bring along more issues to decide, more discovery requests * * * [and] make[] settling a case more difficult."). In contrast with *amici curiae*, intervenors are not limited to making arguments in support of claims and defenses raised by others; they are parties themselves, with their own substantial "control of the suit." *Bethune Plaza*, 863 F.2d at 531; *see also Rio Grande Pipeline Co.* v. *FERC*, 178 F.3d 533, 539 (D.C. Cir. 1999) (contrasting intervenors with *amici*).

B. Court Precedent On The Question Presented.

The question presented asks whether Rule 24(a) intervenors must have independent Article III standing. The Court has identified the question as an unresolved one on two separate occasions, but each time, it decided the case on other grounds.

In the first case, *Diamond*, the Court concluded that it lacked jurisdiction to entertain an appeal brought by a private defendant-intervenor (Eugene Diamond) in support of a state criminal law after the

named state defendant dropped out of the case. 476 U.S. at 56. The Court explained that "an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art[icle] III." *Id.* at 68. Diamond failed to meet these requirements: "Because a private party whose own conduct is neither implicated nor threatened by a criminal statute has no judicially cognizable interest in the statute's defense," the Court dismissed the appeal "for want of jurisdiction." *Id.* at 56.

In its opinion, the *Diamond* Court recognized that there was uncertainty in the law over whether an intervenor must always possess independent Article III standing. *See id.* at 68-69. The Court noted that this question had "led to anomalous decisions in the Courts of Appeals," with some saying that standing is required and others "resolving intervention questions without reference to standing doctrine." *Id.* at 68 & n.21. But the Court found that it "need not decide today whether a party seeking to intervene before a District Court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art[icle] III." *Id.* at 68-69. Because the intervenor clearly had to satisfy Article III's requirements in the circumstances of that case (the absence of the continued participation of the supported party), the Court declined to resolve the broader question. *Id.*

In a second case, *McConnell*, the Court once again noted that the question was unresolved. That case involved a challenge to federal legislation regulating political contributions, and the proponents and

drafters of that legislation intervened in support of the defendant (the Federal Election Commission, or FEC). 540 U.S. at 160-161. Before this Court, one of the plaintiffs "argue[d] that the District Court's grant of intervention to the intervenor-defendants, pursuant to Federal Rule of Civil Procedure 24(a) * * * , must be reversed because the intervenor-defendants lack Article III standing." *Id.* at 233. The Court concluded that it "need not address" the issue, however, because the intervenor-defendants' position was "identical to the FEC's" and thus had no bearing on the Court's authority to resolve the questions presented. *Id.* As in *Diamond*, the Court "reserv[ed] the question for another day." *Id.* (citing *Diamond*, 476 U.S. at 68-69 n.21). This case now squarely presents the question left undecided in *Diamond* and *McConnell*.

C. Factual And Procedural Background.

In 2000, a project developer named Steven Sherman applied to the Town of Chester Planning Board for approval of a 385-unit housing subdivision. Pet. App. 22a. Laroe Estates, Inc. (Laroe) in turn agreed to purchase three parcels of that subdivision once Mr. Sherman secured approval for the development. *Id.* at 3a. Laroe committed to making interim payments to Mr. Sherman while he was pursuing approval in exchange for a mortgage on the property. *Id.* The proposed subdivision never received approval, however, and Mr. Sherman defaulted on his repayment obligations to the senior mortgage holder on his property, TD Bank. *Id.* The bank commenced foreclosure proceedings on the property and took possession following a foreclosure sale in 2014. *Id.* at 3a-4a.

Before the foreclosure, Mr. Sherman filed suit against the Town (as well as its Town Board and Planning Board, both of which were dismissed from the case as non-suable entities). *Id.* at 1a n.*, 2a, 20a-21a n.1. He alleged that the Town wrongfully prevented him from developing his property into a subdivision by repeatedly amending its zoning laws in a manner that was targeted against his project. *Id.* at 21a-22a. He pleaded, among other things, a regulatory-takings claim. *Id.*

The district court dismissed Mr. Sherman's regulatory-takings claim as unripe because the Town had not yet reached a final decision on his development project. *Id.* at 2a, 23a-24a. The Second Circuit reversed on the ground that it would be futile for Nancy Sherman (Mr. Sherman's widow, who took over as plaintiff when Mr. Sherman passed away) to seek a final decision, due to the Town's repeated changes to its zoning laws. *Sherman* v. *Town of Chester*, 752 F.3d 554, 568-569 (2d Cir. 2014).

The case returned to the district court, and Laroe moved to intervene as of right under Federal Rule of Civil Procedure 24(a)(2) or, alternatively, with the court's permission under Rule 24(b). Pet. App. 5a. Laroe argued that it was a contract vendee of the Sherman property and therefore had a sufficient equitable interest in the property to assert a takings claim against the Town. *Id.* at 54a. The district court disagreed. It denied Laroe's motion to intervene based on longstanding circuit precedent holding that, under Article III, "contract vendees lack standing to assert a takings claim." *Id.* at 55a (citing *U.S. Olympic Comm.* v. *Intelicense Corp., S.A.*, 737 F.2d 263, 268 (2d Cir. 1984)).

The Second Circuit vacated and remanded. *Id.* at 19a. The panel identified the relevant holding on review as the district court's determination that "a party seeking to intervene as of right must independently have standing." *Id.* at 6a. It then observed that nine courts of appeals had already "addressed this issue," resulting in a three-to-six "circuit split" that "has persisted for some time." *Id.* at 7a-8a (citing cases). Ultimately, the Second Circuit joined the circuits holding that standing is not required for intervention under Rule 24. *Id.* at 8a-9a. The court described this approach as most consistent with circuit precedent and supported by the fact that, in its view, this Court "has *sub silentio* permitted parties to intervene in cases that satisfy the 'case or controversy' requirement without determining whether those parties independently have standing." *Id.* at 8a (citing *McConnell*, 540 U.S. at 233). The Second Circuit therefore concluded that the district court "erred by denying Laroe's motion to intervene based on [Laroe's] failure to show it had Article III standing." *Id.* at 8a-9a.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THERE IS A DEEP AND ACKNOWLEDGED CIRCUIT SPLIT ON WHETHER PROPOSED INTERVENORS UNDER RULE 24(a) MUST POSSESS ARTICLE III STANDING.

1. The question presented in this case is subject to a widely acknowledged divide among the courts of appeals. Whereas "some courts have ruled that, in addition to satisfying the requirements of Rule 24(a), [an] intervenor must have Article III standing[,] * * *

[o]ther courts have held that standing is not required." Wright, *supra*, § 1908. As discussed above, the Court has twice identified the issue as an unresolved question of federal law. In *Diamond*, the Court acknowledged that "[t]he Courts of Appeals have reached varying conclusions as to whether a party seeking to intervene as of right must himself possess standing." 476 U.S. at 68 n.21. Because the case could be decided on other grounds, however, *Diamond* "reserv[ed] the question for another day." *McConnell*, 540 U.S. at 233 (describing *Diamond*). Then again in *McConnell*, the Court identified as an open question whether a Rule 24(a) intervenor must have Article III standing. *Id.* But once more, the Court concluded that it "need not address" the issue in that case because it would not change the outcome. *Id.*

In the meantime, courts of appeals *have* been deciding the issue, trying to parse this Court's rulings or, as in the decision below, deciphering what the Court "has *sub silentio* permitted." Pet. App. 8a. The courts of appeals are now divided three-to-seven on the question, and this split has led to divergent results on a range of recurring fact patterns—from cases involving environmental regulations and land-condemnation proceedings to cases involving prison conditions and hunting licenses. The result is that, in many circumstances, an entity's ability to intervene in a lawsuit (and thereby engage in discovery, demand relief, and otherwise participate on equal footing with the named parties) hinges entirely on the circuit in which the case is filed. The basic rules of federal civil procedure, and the minimum requirements for participating in federal litigation, should not vary from one city's courthouse to anoth-

er's. The Court should grant certiorari to bring clarity to this critical area of the law.

2. Three courts of appeals—the Seventh, Eighth, and D.C. Circuits—hold that entities cannot intervene as of right under Rule 24(a) unless they also have Article III standing.

In the Seventh Circuit, "standing is necessarily a component of intervention as of right under Rule 24(a)." *Bond* v. *Utreras*, 585 F.3d 1061, 1069-70 (7th Cir. 2009); *see, e.g.*, *City of Chi.* v. *FEMA*, 660 F.3d 980, 984-985 (7th Cir. 2011) ("the intervenor must have Article III standing even" if the "existing parties remain in the case"). The court has therefore adopted "the requirement that the interest of the person seeking intervention as a matter of right must be 'direct, significant, and legally protectable' " to ensure that "the would-be intervenor will not be permitted to push out the already wide boundaries of Article III standing." *Solid Waste Agency* v. *U.S. Army Corps of Eng'rs*, 101 F.3d 503, 507 (7th Cir. 1996). Applying this rule in *United States* v. *36.96 Acres of Land*, 754 F.2d 855 (7th Cir. 1985), the court rejected an environmental organization's motion to intervene in a condemnation action that the organization claimed would harm its "aesthetic and environmental interest[s]." *Id.* at 859. Those interests, the court explained, were not "sufficient to satisfy the standing requirement," and so could not supply the "direct, substantial, and legally protectable" interest needed to intervene under Rule 24(a). *Id.*; *see also Bethune Plaza*, 863 F.2d at 530-531 (rejecting motion to intervene by an entity "worried about [the] *stare decisis*" effect of litigation on unrelated suits); *Keith* v. *Daley*, 764 F.2d 1265, 1269 (7th Cir.

1985) (rejecting motion to intervene by an organization seeking to intervene on the ground that it acted "as chief lobbyist *** in favor of" a statute being challenged).

The Eighth Circuit likewise holds that "a party seeking to intervene must establish Article III standing in addition to the requirements of Rule 24." *United States* v. *Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 833 (8th Cir. 2009); *see, e.g.*, *South Dakota* v. *Ubbelohde*, 330 F.3d 1014, 1023 (8th Cir. 2003) ("A party seeking to intervene must establish both that it has standing to complain and that the elements of Rule 24(a)(2) are met."). The Court has repeatedly denied motions to intervene because the proposed intervenors do not satisfy that constitutional requirement. Thus, in *Tarsney* v. *O'Keefe*, 225 F.3d 929 (8th Cir. 2000), the Eighth Circuit concluded that state legislators could not intervene in litigation "based on their legislative involvement" with a statute being challenged, because such involvement was insufficient to supply "legislator standing" under Article III. *Id.* at 939; *see also Planned Parenthood of Mid-Mo. & E. Kan., Inc.* v. *Ehlmann*, 137 F.3d 573, 578 (8th Cir. 1998) (similar). And in *Metropolitan St. Louis Sewer District*, the court rejected a trade association's effort to intervene in a suit on the basis of anticipated harms to its members because those harms were too "conjectural" and "hypothetical" to establish "Article III standing." 569 F.3d at 836; *see also id.* at 837-838 (explaining that the association would need to satisfy these requirements even if a federal statute "confer[red] an 'unconditional right to intervene'").

The D.C. Circuit agrees. "[I]n addition to establishing its qualification for intervention under Rule 24(a)(2), a party seeking to intervene as of right must demonstrate that it has standing under Article III of the Constitution." *Fund for Animals, Inc.* v. *Norton*, 322 F.3d 728, 731-732 (D.C. Cir. 2003). In its earliest case applying this principle, the D.C. Circuit held that a senator could not intervene in a case concerning the disposition of electronic recordings of Dr. Martin Luther King, Jr., "because the [senator] lack[ed] a protectable interest sufficient to confer standing." *S. Christian Leadership Conference* v. *Kelley*, 747 F.2d 777, 778 (D.C. Cir. 1984) (per curiam). The court has since invoked Article III standing requirements as the basis for denying numerous motions to intervene, including by a hunters' group seeking to challenge a species-listing procedure that might "lead to the listing of three game species," *In re Endangered Species Act Section 4 Deadline Litig.-MDL No. 2165* (*Section 4 Deadline Litig.*), 704 F.3d 972, 976, 979 (D.C. Cir. 2013) (concluding that the group "lacked standing and therefore was ineligible to intervene as of right" because it "ha[d] failed to identify a violation of a procedural right" (citation omitted)); by a bank raising a "hopelessly conjectural" concern that the named parties would reach a settlement unfavorable to it, *Deutsche Bank Nat'l Tr. Co.* v. *FDIC*, 717 F.3d 189, 193-194 (D.C. Cir. 2013) (explaining that the proposed intervenors do not "have standing under Article III"); and by a power company "concern[ed] about the precedential effect of an adverse decision," *City of Cleveland* v. *Nuclear Regulatory Comm'n*, 17 F.3d 1515, 1515-16 (D.C. Cir. 1994) (per curiam) (explaining that this interest "is not sufficient to confer standing").

Each of these three circuits, then, views Article III standing as a prerequisite for intervention under Rule 24. And each one has rejected motions to intervene filed by entities that they found to lack constitutional standing.

3. In sharp contrast with these courts, the Second, Third, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits have each held that entities do not need Article III standing to intervene in a lawsuit under Rule 24.

The Second Circuit joined the circuit divide in the decision below. It recognized that "a circuit split * * * has persisted for some time" on the question whether "a party seeking to intervene as of right must independently have standing." Pet. App. 6a, 8a. Reaching that question explicitly for the first time, the Second Circuit concluded that "[t]he answer is no." *Id.* at 2a; *see also id.* at 6a, 7a n.1 (noting that the Second Circuit had previously "suggested somewhat" that standing was not required). Accordingly, the panel permitted Laroe's motion for intervention to proceed notwithstanding that the court was unable to conclude "that Laroe had *an*[y] interest in the property" that is the subject of this dispute. *Id.* at 15a (emphasis added).

The Fifth Circuit also holds that Article III generally "does not require intervenors to independently possess standing." *Ruiz* v. *Estelle*, 161 F.3d 814, 830 (5th Cir. 1998). It has therefore concluded that state legislators could intervene under Rule 24(a)(1) in a suit concerning Texas prison conditions, even though "[i]t [wa]s doubtful" that they "ha[d] sufficient standing" to satisfy Article III. *Id.* at 829. Indeed, the Fifth Circuit explained, even "assum[ing] * * * that

[the legislators did] *not* have such standing," it would still permit intervention because "Article III does not require intervenors to independently possess standing where the intervention is into a subsisting and continuing Article III case or controversy." *Id.* at 830 (emphasis added); *see also Sierra Club* v. *Glickman*, 82 F.3d 106, 109-110 (5th Cir. 1996) (holding that courts must grant intervention to a party concerned about the potential "*stare decisis* effects of an adverse judgment," even if future courts "w[ould] not be bound by the outcome of" the suit, because such a decision "could be relied upon as precedent").

The Sixth Circuit, too, has held that "an intervenor need not have the same standing necessary to initiate a lawsuit"; on the contrary, it takes "a rather expansive notion of the interest sufficient to invoke intervention of right." *Mich. State AFL-CIO* v. *Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997); *see also Purnell* v. *City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991) (similar). For example, like the Fifth Circuit—and in contrast with the Seventh and D.C. Circuits—the Sixth Circuit holds that "the possibility of adverse stare decisis effects provides intervenors with sufficient interest to join an action." *Jansen* v. *City of Cincinnati*, 904 F.2d 336, 342 (6th Cir. 1990); *see also Mich. State AFL-CIO*, 103 F.3d at 1247 (allowing an interest group to intervene in a suit in part because it was "a vital participant in the political process that resulted in [the] adoption" of the law at issue).

The Ninth Circuit takes a similar view. It says that, "[i]n general, an applicant for intervention need not establish Article III standing to intervene." *Perry* v. *Schwarzenegger*, 630 F.3d 898, 906 (9th Cir.

2011) (per curiam); *see also Yniguez* v. *Arizona*, 939 F.2d 727, 735 (9th Cir. 1991). It thus applies "a virtual *per se* rule that the sponsors of a ballot initiative have a sufficient interest in the subject matter of litigation concerning the initiative to intervene pursuant to Fed. R. Civ. P. 24(a)," *Yniguez*, 939 F.2d at 733, notwithstanding that such an interest is often insufficient to establish Article III standing. *See Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2663 (2013) (concluding that the sponsors of a ballot initiative "ha[d] no 'personal stake' in defending [the law's] enforcement that is distinguishable from the general interest of every citizen of California" and thus lacked Article III standing); *see also Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 66 (1997) (similar).

The Third, Tenth, and Eleventh Circuits have all issued similar holdings. *See King* v. *Governor of New Jersey*, 767 F.3d 216, 245 (3d Cir. 2014) (holding that "an intervenor is not required to possess Article III standing to participate"); *San Juan Cty.* v. *United States*, 503 F.3d 1163, 1172 (10th Cir. 2007) (en banc) ("[P]arties seeking to intervene under Rule 24(a) or (b) need not establish Article III standing."); *Dillard* v. *Chilton Cty. Comm'n*, 495 F.3d 1324, 1337 (11th Cir. 2007) (per curiam) ("[A]n intervenor need not make an independent showing that he or she meets the standing condition of Article III."). And like the others on the long side of the split, these courts have permitted intervention in circumstances where Article III standing is plainly lacking—holding, for instance, that environmental organizations could intervene in a suit challenging a particular national monument because "the *stare decisis* effect of the district court's judgment" might impair

the organizations' interest in "seeking presidential designation of *other* national monuments in the future." *Utah Ass'n of Cntys.* v. *Clinton*, 255 F.3d 1246, 1254 (10th Cir. 2001) (citation omitted); *see also Stone* v. *First Union Corp.*, 371 F.3d 1305, 1310-11 (11th Cir. 2004) (holding that "the potential for negative stare decisis" justifies intervention even if another court "would not be bound" by the decision at issue, because that decision might "have significant persuasive effects" that "could influence later suits"); *King*, 767 F.3d at 246 (holding that an advocacy group "need not demonstrate Article III standing in order to intervene" in a challenge to a New Jersey statute).

4. The courts of appeals' continued divide over the question presented is not subject to dispute. The courts have recently, and repeatedly, acknowledged it. *See, e.g.*, Pet. App. 8a ("[A] circuit split on this issue has persisted for some time."); *King*, 767 F.3d at 245 ("[O]ur sister circuits are divided on th[e] question" whether "prospective *intervenors* must establish Article III standing."); *Metro. St. Louis Sewer Dist.*, 569 F.3d at 833 n.2 (describing "the circuit split regarding whether an intervenor must demonstrate standing"); *Dillard*, 495 F.3d at 1337 n.10 ("Other circuit courts have split in answering the question."). So too has the Solicitor General. *See* U.S. Br. in Opp. at 6, *Loyd* v. *Ala. Dep't of Corr.*, No. 99-248, 1999 WL 33640447 (Nov. 1999) (noting the "conflict in the circuits" but stating that the petition at hand did not squarely present it).

Nor is there any prospect that this division will resolve itself. Each court on the short side of the split has recently and sharply reasserted its position.

See Section 4 Deadline Litig., 704 F.3d at 976 (D.C. Cir. 2013) ("[t]he underlying rationale for th[e] [standing] requirement is clear" (citation omitted)); *City of Chi.*, 660 F.3d at 984-985 (7th Cir. 2011) (criticizing cases on the other side of the split and explaining what "[t]he cases that dispense with the [standing] requirement overlook"); *Metro. St. Louis Sewer Dist.*, 569 F.3d at 833 n.2 (8th Cir. 2009) (reviewing the split and concluding that there is "no reason" for the Eighth Circuit to revisit its position). And courts on both sides of the divide have grounded their respective rules in this Court's *Diamond* and *McConnell* decisions, making it unlikely that they will voluntarily change their positions. *Compare Ruiz*, 161 F.3d at 830 (noting that "some courts have interpreted language in *Diamond* to suggest that Article III may require intervenors to possess standing as a matter of constitutional law"), *with San Juan Cty.*, 503 F.3d at 1171-72 (drawing "support" for the contrary conclusion from the fact that the Court did not think it necessary to "specifically resolve" the question (citation omitted)), *and* Pet. App. 8a (saying that *McConnell* "suggested * * * that an intervenor need not independently have standing where the original party has standing"), *with United States* v. *Philip Morris USA Inc.*, 566 F.3d 1095, 1146 (D.C. Cir. 2009) (per curiam) (citing *McConnell* for the proposition that "one intervenor must have standing for us to consider their additional proposed remedy").

Because the conflict has persisted for decades without resolution, and the courts of appeals are in substantial disagreement over what this Court's prior cases referencing the issue might signal, this Court should grant the petition to finally resolve the

conflict and clarify whether Article III imposes any limit on who is entitled to intervene in federal cases.

II. THE DECISION BELOW IS WRONG.

The Court should also grant certiorari because the position adopted by the majority of circuits is wrong. Intervention gives an entity "equal standing with the original parties" and the authority to "litigate fully on the merits"—including such privileges as the right to seek discovery, demand a jury trial, request remedies, block settlements, receive attorney's fees, and (in some circumstances) raise new claims. Wright, *supra*, §§ 1920-1921; *see also City of Cleveland*, 17 F.3d at 1517; *Bethune Plaza*, 863 F.2d at 531. Each entity seeking to obtain these privileges at the *outset* of a suit must show that it has Article III standing. *See, e.g.*, *Fontenot* v. *McCraw*, 777 F.3d 741, 746 (5th Cir. 2015) ("The court must evaluate *each plaintiff's* Article III standing for each claim; 'standing is not dispensed in gross.'" (emphasis added) (quoting *Lewis* v. *Casey*, 518 U.S. 343, 358 n.6 (1996))). There is no reason why an entity should be exempt from this requirement merely because it waits until *after* a suit is filed to become a plaintiff. It comports with common sense that, "because an intervenor participates on equal footing with the original parties to a suit, a movant for leave to intervene under Rule 24(a)(2) must satisfy the same Article III standing requirements as original parties." *Bldg. & Constr. Trades Dep't* v. *Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994).

This view of intervenor standing is consistent with this Court's prior statements on the requirements of Article III. The Court has said that "*any person* invoking the power of a federal court must demon-

strate standing to do so." *Hollingsworth*, 133 S. Ct. at 2661 (emphasis added). "Those who do not possess Art[icle] III standing may not litigate as suitors in the courts of the United States." *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475-476 (1982). Because an intervenor is a "person invoking the power of a federal court," the intervenor "may not litigate as [a] suitor[] in the courts of the United States" without "Art[icle] III standing." *Hollingsworth*, 133 S. Ct. at 2661; *Valley Forge*, 454 U.S. at 475-476.

The contrary rule adopted by the majority of circuits should not be permitted to stand. That rule imposes significant costs on the legal system. It allows parties that have only an attenuated interest in a case—too attenuated, by definition, to support the constitutional minima of standing—to make costly demands concerning discovery, remedies, fees, and other matters. That is one reason why the Seventh Circuit requires intervenors to have standing: "because intervention can impose substantial costs on the parties and the judiciary, not only by making the litigation more cumbersome but also (and more important) by blocking settlement, the would-be intervenor will not be permitted." *Solid Waste Agency*, 101 F.3d at 507 (citation omitted). Without the "already wide boundaries of Article III standing" as a backstop, *id.*, "intervention would be too easy and clutter too many lawsuits with too many parties," *City of Chi.*, 660 F.3d at 985.

This case offers a vivid illustration of the costs imposed by the majority rule. According to Laroe, the current plaintiff, Ms. Sherman, has asserted that

she lacks an "incentive to move the case forward" and is "unwilling to pursue the takings claim" herself. Pet. App. 13a (citation omitted). Yet by permitting Laroe to intervene—despite its inability to identify a cognizable interest in the outcome of the suit—the court has prolonged a case that has already lasted for eight years. *Id.* at 12a. Laroe's presence has "ma[d]e it really a new case." *City of Chi.*, 660 F.3d at 985 (citations omitted). Laroe therefore should be required to demonstrate its Article III standing. *See id.*

III. THIS CASE PROVIDES THE IDEAL VEHICLE FOR THE COURT TO RESOLVE THIS IMPORTANT QUESTION.

1. The question presented is critically important because it concerns the proper reach of federal courts' Article III subject-matter jurisdiction in cases involving intervenors—cases numbering in the hundreds every year. The importance of the question is reflected in the fact that this Court has decided similar questions related to intervenor standing on multiple occasions in recent years. *See Wittman* v. *Personhuballah*, 136 S. Ct. 1732, 1737 (2016) (intervenors lacked standing to appeal); *Hollingsworth*, 133 S. Ct. at 2668 (same); *see generally Arizonans for Official English*, 520 U.S. at 66 (expressing "grave doubts whether [the intervenors] have standing under Article III to pursue appellate review").

The question presented also is a frequently recurring one. In the circuits where Article III standing is a prerequisite for intervention, an entity's ability to intervene is often decided on that ground. *See, e.g.*, *Agric. Retailers Ass'n* v. *U.S. Dep't of Labor*, No. 15-

1326, 2016 WL 5315200, at *4 (D.C. Cir. Sept. 23, 2016) ("We deny the motion because the Union has failed to establish its standing to intervene."); *In re Idaho Conservation League*, 811 F.3d 502, 513-514 (D.C. Cir. 2016) ("We conclude the proposed intervenors fall short of demonstrating their right to intervene because they fail to show they have Article III standing, which they do not dispute is required."); *Mo. Coal. for the Env't Found.* v. *Mccarthy*, No. 2:16-CV-04069-NKL, 2016 WL 3566253, at *4 (W.D. Mo. June 27, 2016) ("Accordingly, the Intervenors have not identified an imminent injury that grants them Article III standing in this lawsuit. Their request to intervene under Rule 24(a) is denied." (footnote omitted)); *Liddell* v. *Bd. of Educ. of City of St. Louis*, No. 4:72CV100 HEA, 2016 WL 3913762, at *2 (E.D. Mo. July 20, 2016) ("Based upon the foregoing analysis, the Court concludes that Movants lack standing to intervene in this matter, and therefore, the Motion will be denied."); *Forest Cty. Potawatomi Cmty.* v. *United States*, No. CV 15-105 (CKK), 2016 WL 1465324, at *4 (D.D.C. Apr. 14, 2016) ("The Menominee have standing under Article III to intervene in this case." (underlining removed)).

Even in those circuits that do not require standing, courts continue to address the issue. *See, e.g.*, *Timber View Props., Inc.* v. *M&T Prop. Invs. Ltd.*, No. 2:15-CV-2855, 2016 WL 4472771, at *2 (S.D. Ohio Aug. 25, 2016) ("even though Gemmell may not ultimately have standing, the standards for intervention are met in this case"); *Steward* v. *Abbott*, No. 5:10-CV-1025-OLG, 2016 WL 4771311, at *1 (W.D. Tex. May 17, 2016) ("To the extent that Texas's argument for dismissal goes to Article III standing, it fails because the United States, as an intervenor who

seeks no relief beyond that sought by the Plaintiffs in this case, need not possess Article III standing to proceed.").

And in the outlier courts of appeals that have not decided the issue (the First, Fourth, and Federal Circuits), the district courts have had to reach their own conclusions in light of the circuit divide. *See, e.g.*, *NAACP* v. *Duplin Cty.*, No. 7:88-CV-00005-FL, 2012 WL 360018, at *3 n.3 (E.D.N.C. Feb. 2, 2012) ("declin[ing] to impose the requirement that defendant intervenors must show Article III standing in order to intervene as a matter of right where the Fourth Circuit is silent on the issue"); *Brook Vill. N. Assocs.* v. *Jackson*, No. 06-CV-046-JD, 2006 WL 3308328, at *4 (D.N.H. Nov. 13, 2006) ("declin[ing] to permit [entities] to intervene absent a showing that they have standing" given that "[t]he circuits are split as to whether standing is required for intervention" and "the First Circuit has not decided the question"); *Wolfchild* v. *United States*, 77 Fed. Cl. 22, 28 n.12 (2007) (noting that "no reported decision of the Federal Circuit appears directly to address * * * whether an intervenor must satisfy the requirements of Fed. R. Civ. P. 24(a) *and* Article III," but requiring standing in an "analogous" circumstance).

Given the great importance of the issue as a doctrinal matter, and its frequently recurring nature, resolution of the question presented is of great practical importance to litigants. As the Litigation Section of the American Bar Association has recognized, "[w]ould-be intervenors continue to face differing standards for joining a lawsuit under Federal Rule of Civil Procedure 24" because "[f]ederal circuit courts remain divided over whether it is sufficient for

intervenors as of right to meet the 'interest' requirement of Rule 24(a) or whether they must also independently establish standing under Article III of the Constitution." Renee Choy Ohlendor, Am. Bar Ass'n, Litigation News, *Intervenors Still in Limbo on Standing Requirements* (Mar. 26, 2012), https://goo.gl/OxLocd. With the rule of intervention varying from court to court, "[t]he word to the wise is, for the moment, to know how your circuit treats this issue." And "[a]s to whether there will be a resolution of the circuit split any time soon, that's up to the Supreme Court." *Id.* (internal quotation marks omitted).

2. This case furnishes the right vehicle for the Court to finally resolve this issue. Since the circuit split emerged years ago, the Court has not been presented with a viable opportunity to decide the question. In *Diamond* and *McConnell*, the question was left unresolved because it was unnecessary to the resolution of the matter. *See McConnell*, 540 U.S. at 233 (declining to separately evaluate the intervenor's standing because its "position * * * is identical to the [defendant's]"); *Diamond*, 476 U.S. at 68 (declining to determine whether an intervenor generally must possess independent standing because the defendant in that case was no longer participating, so the intervenor had to "satisfy the requirements of Art[icle] III" "[t]o continue th[e] suit in the absence of [the defendant]").

Apart from these cases, the Court appears to have received seven petitions for certiorari that in some

way asked it to resolve this issue.[1] But each one suffered from a severe vehicle problem. In four petitions, the issue was irrelevant to the outcome of the case, either because the lower court's decision did not turn on which standard it applied or (as in *McConnell*) because the proposed intervenor raised no arguments not also raised by a named party. *See See* Br. in Opp. at 20, *King* v. *Governor of New Jersey*, No. 14-672, 2015 WL 546274 (Feb. 4, 2015); U.S. Br. in Opp. 5-6, *Elko Cty.* v. *Wilderness Soc'y*, No. 08-571, 2009 WL 390030 (Feb. 13, 2009); Br. in Opp. at 5, *Standing Together to Oppose Partial-Birth-Abortion* v. *Northland Family Planning Clinic, Inc.*, No. 07-291, 2007 WL 3322288 (Nov. 5, 2007); Br. in Opp. at 8-9, *Bradley* v. *First Gibraltar Bank, FSB*, No. 96-1276, 1997 WL 33561420 (Apr. 14, 1997). Two petitions described a narrow and unusual application of the split or were filed before the split concretely emerged. *See* Cert. Pet. at 17, *Cotter* v. *Mass. Ass'n of Minority Law Enf't Officers*, No. 00-563, 2000 WL 34000644 (Oct. 10, 2000); Cert. Pet. at 9, *Nw. Forest Res. Council* v. *Portland Audubon*

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[1] *See* Cert. Pet. at 34, *King* v. *Governor of New Jersey*, No. 14-672, 2014 WL 6847205 (Apr. 14, 1997); Cert. Pet. at 9, *Elko Cty.* v. *Wilderness Soc'y*, No. 96-1276, 2008 WL 4757428 (Oct. 28, 2008); Cert. Pet. at 11, *Standing Together to Oppose Partial-Birth-Abortion* v. *Northland Family Planning Clinic, Inc.*, No. 07-291, 2007 WL 2491376 (Aug. 30, 2007); Cert. Pet. at 17, *Cotter* v. *Mass. Ass'n of Minority Law Enf't Officers*, No. 00-563, 2000 WL 34000644 (Oct. 10, 2000); Cert. Pet. at 5-11, *Loyd, supra*, No. 99-248, 1999 WL 33640442 (July 6, 1999); Cert. Pet. at 10, *Bradley* v. *First Gibraltar Bank, FSB*, No. 96-1276, 1997 WL 33557429 (Feb. 7, 1997); Cert. Pet. at 9, *Nw. Forest Res. Council* v. *Portland Audubon Soc'y*, No. 88-1751, 1989 WL 1174212 (Apr. 22, 1989).

Soc'y, No. 88-1751, 1989 WL 1174212 (Apr. 22, 1989). One petition did not involve a Rule 24 motion to intervene at all. U.S. Br. in Opp. at 6-7, *Loyd*, *supra* (No. 99-248)

This case suffers from none of these defects. Laroe filed a motion "to intervene as a matter of right pursuant to Rule 24(a)(2)." Pet. App. 53a. The district court denied the motion because it held that Laroe "does not have standing" as a contract vendee of the property at issue to assert a takings claim. *Id.* at 57a; *see U.S. Olympic Comm.*, 737 F.2d at 268 ("Only the owner of an interest in property at the time of the alleged taking has standing to assert that a taking has occurred."). The Second Circuit then vacated the order and remanded the case for one reason: "Because we do not require proposed intervenors in this circumstance to show that they independently have standing." Pet. App. 2a. That ruling was dispositive of the appeal. *Id.* at 19a. This case thus cleanly presents the sole issue whether standing is a prerequisite for intervention as of right under Rule 24(a).

In sum, this case presents the right vehicle for the Court to resolve the circuits' acknowledged, intractable, and increasingly consequential dispute over whether standing is required to intervene as of right under Rule 24(a). The Court should grant the petition, hold that intervenors must possess Article III standing, and vacate the decision below and remand the case for further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 2016

APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 15-1086-cv

LAROE ESTATES, INC.,

Movant-Appellant,

v.

TOWN OF CHESTER,

Defendant-Appellee.*

Appeal from the United States District Court
for the Southern District of New York
No. 12 Civ. 647 (Ramos, D.J.)

Argued January 27, 2016
Decided July 6, 2016

Before: CALABRESI, LYNCH, and LOHIER,
Circuit Judges.

LOHIER, *Circuit Judge*:

In this appeal we consider whether a proposed intervenor must demonstrate that it has standing

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* The Clerk of the Court is directed to amend the caption of this case as set forth above.

even when there is a genuine case or controversy between the existing parties that satisfies the requirements of Article III of the Constitution. The answer is no.

Steven Sherman, a now-deceased land developer, previously sued the Town of Chester (the "Town") alleging a regulatory taking. That litigation remains pending in the United States District Court for the Southern District of New York (Ramos, J.). Laroe Estates, Inc. ("Laroe"), a real estate development company, claimed that it, not Sherman, currently owns the property that is the subject of Sherman's dispute and sought to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure. Rather than determine whether Laroe satisfied the requirements of Rule 24, the District Court denied Laroe's motion on the ground that Laroe lacked standing to assert a takings claim against the Town. Because we do not require proposed intervenors in this circumstance to show that they independently have standing, we **VACATE** the order and **REMAND** to the District Court to determine in the first instance whether Laroe met the requirements of Rule 24.

BACKGROUND

This is the second time that this Court has considered a dispute related to the abandoned MareBrook development project in the Town of Chester. When we last did so, the District Court had dismissed Sherman's regulatory takings claim against the Town because it was unripe. Sherman v. Town of Chester, No. 12 Civ. 647 (ER), 2013 WL 1148922, at *9 (S.D.N.Y. Mar. 20, 2013). We reversed that decision, holding that the claim could proceed even though the Town never "rendered a

final decision on the matter." Sherman v. Town of Chester, 752 F.3d 554, 561 (2d Cir. 2014) (quotation marks omitted). That conclusion was based on the extraordinary facts of Sherman's case—facts that are fully recounted in our previous decision, with which we assume familiarity. We remanded the case back to the District Court to consider Sherman's takings claim on the merits. Id. at 569.

Shortly thereafter, Laroe filed a motion to intervene, purporting to be the equitable owner of the property at issue in Sherman's dispute. Laroe claims that it entered into a purchase agreement with Sherman in June 2003 (the "2003 Agreement"), pursuant to which Sherman agreed to sell Laroe three parcels of land within the proposed MareBrook subdivision. In exchange, Laroe agreed that it would pay $60,000 for each lot approved for development within the three parcels once Sherman's plans were approved by the Town. The agreement also required Laroe to make $6 million in interim payments while Sherman sought the Town's approval. The interim payments were secured by a mortgage that Sherman provided to Laroe "encumbering all of the Development Property." Joint App'x 192. If Sherman failed to obtain the Town's approval of a sufficient number of lots, Laroe retained the right to terminate the agreement. Over the next year, Laroe advanced Sherman more than $2.5 million for the project.

Although Sherman's efforts to secure the Town's approval stretched on, Laroe did not terminate the agreement. But in April 2013 TD Bank, which held a superior mortgage interest in the property, commenced a foreclosure proceeding. Hoping to

salvage the deal in view of the foreclosure, Laroe and Sherman signed a new contract (the "2013 Agreement") amending their earlier purchase agreement. The 2013 Agreement provided that the $2.5 million Laroe had already advanced Sherman, plus any amount paid to settle Sherman's obligation to TD Bank, would constitute the purchase price of the property. Once the Town approved the development, Laroe was required to transfer a certain number of lots back to Sherman depending on how many were approved by the Town. Subject to this requirement, the parties deemed the purchase price for the property "paid in full." Joint App'x at 234. To resolve TD Bank's foreclosure proceeding, the 2013 Agreement also granted Laroe the sole discretion to settle the debt owed to TD Bank and alternatively permitted Laroe to terminate the Agreement if Laroe and TD Bank failed to reach a settlement before the foreclosure sale. Laroe ultimately failed to satisfy Sherman's obligations to TD Bank. On May 21, 2014, a foreclosure sale occurred, and TD Bank took possession of the property. Laroe nevertheless chose not to terminate the agreement.

Throughout this period, Sherman (and subsequently his estate) continued litigating his takings claim. After we remanded the case, Laroe sought to intervene. By order dated March 31, 2015, the District Court denied the motion, concluding that Laroe's claim against the Town was futile. Sherman v. Town of Chester, No. 12 Civ. 647 (ER), 2015 WL 1473430, at *15–16 (S.D.N.Y. Mar. 31, 2015). Although the District Court acknowledged that "legal futility is not mentioned in Rule 24," it reasoned that

futility was nonetheless "a proper basis for denying a motion to intervene." Id. at *15 (citing In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig., Nos. 02 MDL 1484 (JFK), 02 Civ. 8472 (JFK), 2008 WL 2594819, at *5 (S.D.N.Y. June 26, 2008)). Relying on our decision in U.S. Olympic Committee v. Intelicense Corporation., S.A., 737 F.2d 263 (2d Cir. 1984), the District Court concluded that Laroe lacked standing to assert a takings claim because it was not "the owner of an interest in property at the time of the alleged taking." Sherman, 2015 WL 1473430, at *15 (quoting U.S. Olympic Comm., 737 F.2d at 268).

Having concluded that Laroe lacked standing, the District Court did not discuss at length whether Laroe otherwise satisfied the requirements of Rule 24, other than to suggest in a footnote that "it [was] not clear that [Laroe] satisfie[d] Rule 24's timeliness requirement," since Laroe waited to file its motion until after this Court reversed the District Court's decision dismissing Sherman's takings claim. Id. at *16 n. 20. But because the District Court concluded Laroe lacked standing, it declined to determine whether the motion was timely. Id.

This appeal followed.

DISCUSSION

1. Article III Standing

Laroe filed a motion for intervention as a matter of right under Rule 24(a)(2) or, in the alternative, permissive intervention under Rule 24(b). We review a district court's denial of a motion to intervene for abuse of discretion. Floyd v. City of New York, 770 F.3d 1051, 1057 (2d Cir. 2014). A district court abuses its discretion when "its decision

rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding." MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, 471 F.3d 377, 385 (2d Cir. 2006). Here, the District Court denied the motion as futile because, it held, a party seeking to intervene as of right must independently have standing, and Laroe, it concluded, separately lacked standing to assert a takings claim against the Town. See Sherman, 2015 WL 1473430, at *16. Although, as the District Court acknowledged, "legal futility is not mentioned in Rule 24," id. at *15, we have affirmed denials of a motion to intervene on that basis, United States v. Glens Falls Newspapers, Inc., 160 F.3d 853, 856 (2d Cir. 1998) (affirming the denial of a newspaper's motion to intervene to ask the district court to vacate a consent order sealing draft settlement documents). But we have not held that a party seeking to intervene as of right must independently have standing.

In fact, we suggested somewhat to the contrary in United States Postal Service v. Brennan, where a union of postal service employees sought to intervene in a dispute between the U.S. Postal Service and the owners of a small mail-delivery business in Rochester. 579 F.2d 188, 190 (2d Cir. 1978). The district court denied the union's motion partly because the union lacked standing. Although we ultimately affirmed that decision on other grounds, id. at 191, we explained that the motion should not have been denied for lack of standing, because "[t]he question of standing in the federal courts is to be considered in the framework of Article III[,] which restricts judicial power to 'cases' and 'controversies,'"

id. at 190 (quotation marks omitted). Therefore, we reasoned, "there [is] no need to impose the standing requirement upon [a] proposed intervenor" where "[t]he existence of a case or controversy [has] been established" in the underlying litigation. Id. Our approach accords with that of the majority (but not all) of our sister circuits that have addressed this issue.[1] See, e.g., King v. Governor of the State of New Jersey, 767 F.3d 216, 245–46 (3d Cir. 2014); Perry v. Schwarzenegger, 630 F.3d 898, 905–06 (9th Cir. 2011); City of Herriman v. Bell, 590 F.3d 1176, 1183–1184 (10th Cir. 2010); Dillard v. Chilton Cty. Comm'n, 495 F.3d 1324, 1336–37 & n. 10 (11th Cir. 2007); United States v. Tennessee, 260 F.3d 587, 595 (6th Cir. 2001); Ruiz v. Estelle, 161 F.3d 814, 829–30 (5th Cir. 1998). But see, e.g., City of Chicago v. Fed. Emergency Mgmt. Agency, 660 F.3d 980, 984–85 (7th Cir. 2011) (treating Article III standing as an

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[1] Some commentary mistakenly suggests that the Second Circuit is one of the minority of jurisdictions that require intervenors to demonstrate that they independently have standing, relying on our decision in In re Holocaust Victim Assets Litigation, 225 F.3d 191 (2d Cir. 2000), cited in 6 Moore's Federal Practice § 24.03. In that case, we dismissed the appeal of an intervening nonprofit organization because it lacked standing. Id. at 196-97. But we based that decision on the prudential (rather than constitutional) ground that it failed to show that it had "organizational standing." Id. at 195–97; see also Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977). Although we acknowledged that six of the nonprofit's members ostensibly had standing to sue in their own right, we ultimately affirmed the District Court's denial of their motion to intervene because they did not otherwise satisfy the requirements of Rule 24. Holocaust Victim Assets Litig., 225 F.3d at 197-202. Holocaust Victim Assets Litigation therefore does not abrogate our position in Brennan that a proposed intervenor need not independently have standing.

additional requirement for intervenors); United States v. Metro. St. Louis Sewer Dist., 569 F.3d 829, 833–34 & n. 2 (8th Cir. 2009) (same); United States v. Philip Morris USA Inc., 566 F.3d 1095, 1145–46 (D.C. Cir. 2009) (same).

Although a circuit split on this issue has persisted for some time, the Supreme Court has expressly declined to resolve it. See Diamond v. Charles, 476 U.S. 54, 68–69 (1986). Instead, in Diamond v. Charles, it ruled only that when the original party in the litigation on whose side intervention occurred refuses to appeal and an intervenor wishes to appeal on its own, the intervenor must show that it satisfies Article III's standing requirement in the absence of the original party. Id. at 68. But since Diamond, the Supreme Court has certainly suggested—although without deciding—that an intervenor need not independently have standing where the original party has standing. In McConnell v. Federal Election Commission, for example, the Court determined that it "need not address the standing of the intervenor-defendants" because it was "clear . . . that the [named defendant,] . . . whose position . . . [was] identical to the [intervenor-defendants',]" had standing. 540 U.S. 93, 233 (2003), overruled on other grounds by Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010). So it is fair to say that while the Supreme Court has not explicitly endorsed our approach, it has sub silentio permitted parties to intervene in cases that satisfy the "case or controversy" requirement without determining whether those parties independently have standing. The District Court therefore erred by denying

Laroe's motion to intervene based on its failure to show it had Article III standing.

2. Failure to State a Claim

The Town argues in the alternative that we should affirm the District Court's order because Laroe's motion also fails to state a claim against the Town—whether or not Laroe has standing. Oral Arg. Tr. 27. That argument, however, is foreclosed by Trbovich v. United Mine Workers of America, 404 U.S. 528 (1972). In that case, a union member sought to intervene in a suit by the Secretary of Labor seeking to set aside the results of a union election. Id. at 529–30. Although, under the relevant statute, only the Secretary was authorized to bring such a claim, the union member was permitted to participate on the Secretary's side of the case, as long as he did not assert any new grounds for relief. Id. at 537, 539. Thus, under Trbovich, a party need not have a stand-alone claim of its own to intervene on the plaintiff's side of a case—at least as long as it asserts the same legal theories and seeks the same relief as the existing plaintiff.

That principle applies here. Although it is unclear from the record whether Laroe believes the Town is directly liable to Sherman or Laroe for the alleged taking, Laroe has acknowledged that its damages are essentially the same as Sherman's. Oral Arg. Tr. 16. And the Town does not dispute that the land that Laroe now claims it owns is part of the same parcel of land at issue in Sherman's takings litigation. Even if Laroe has no independent claim that could survive a motion to dismiss under Rule 12(b)(6)—an issue we need not decide—that does not bar it from continuing to participate in the litigation of

Sherman's takings claim, so long as it seeks relief that does not differ substantially from that sought by Sherman. Because neither a proposed intervenor's lack of Article III standing nor its failure to state an independent claim necessarily renders a motion to intervene futile, the District Court should have instead focused its analysis on the requirements of Rule 24, to which we now turn.

3. Rule 24

Laroe filed a motion for both intervention as a matter of right and permissive intervention. Convincing us to reverse the denial of a motion for permissive intervention is notoriously difficult. See United States v. Pitney Bowes, Inc., 25 F.3d 66, 73 (2d Cir. 1994). Here, though, we need not address Laroe's motion for permissive intervention because Laroe relies on the same "reasons supporting [its] request to intervene as [of] right." Appellant's Br. 34. We therefore focus on only Laroe's motion to intervene as of right.

The district court must grant an applicant's motion to intervene under Rule 24(a)(2) if "(1) the motion is timely; (2) the applicant asserts an interest relating to the property or transaction that is the subject of the action; (3) the applicant is so situated that without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the other parties." MasterCard, 471 F.3d at 389; see also Fed. R. Civ. P. 24(a)(2). The Town of Chester argues that Laroe fails this test because its application was untimely, it lacks a separate interest in the proceeding, and any interest it has in the

litigation is adequately represented by Sherman's estate. Because the factual record before us is insufficiently developed at this stage to allow us confidently to resolve these arguments, we vacate the order and remand to the District Court to determine in the first instance if Laroe satisfies the requirements of Rule 24.

A. Timeliness

In determining whether a motion to intervene is timely, courts consider "(1) how long the applicant had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness." Pitney Bowes, 25 F.3d at 70.

The Town contends that Laroe waited too long to file its motion to intervene. Laroe responds that it first learned of this litigation after the Town filed its motion to dismiss in May 2012. Although Laroe waited until May 2014 to inform the District Court that it wished to intervene, it explains that it could not have filed its motion earlier because the District Court had by then dismissed Sherman's suit and it could have intervened only after we decided Sherman's appeal in 2014.

Laroe's explanation fails to answer why it did not try to intervene before the District Court first dismissed Sherman's takings claim. But even assuming that Laroe could have moved to intervene sooner, the litigation is still at an early stage. After we remanded the case, the Town filed a motion to dismiss several other claims from Sherman's complaint that we did not address in our previous

opinion. A motion for reconsideration is now pending before the District Court. So despite eight years having passed since Sherman first filed suit in federal court (and more than sixteen years since Sherman first applied for subdivision approval), the parties have not even begun discovery. Although we recognize that "the point to which the suit has progressed" is only "one factor in the determination of timeliness," NAACP v. New York, 413 U.S. 345, 365-66 (1973), this case does not represent an attempt by an intervenor to join a lawsuit at the eleventh hour.

Nor are we persuaded that Laroe's delay in filing the motion prejudiced the Town. The Town points to two ways in which it may have suffered prejudice. First, it asserts, Laroe's intervention would create "[t]he possibility of . . . a much more difficult settlement position." Oral Arg. Tr. 29. Second, it claims that because Laroe's contract with Sherman was essentially only a mortgage agreement, other creditors may attempt to join the litigation if Laroe is permitted to intervene.[2] While both arguments may explain how the Town is prejudiced by Laroe's participation in the litigation, neither shows how it would be prejudiced by Laroe's delay in filing its motion to intervene—our only concern on timeliness

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[2] The latter argument assumes that Sherman's other creditors are similarly situated to Laroe—in other words, that they agreed to purchase property from Sherman, prepaid a substantial sum of money, and signed a second agreement with Sherman that deemed the purchase price paid in full. There is nothing in the record before us to suggest that any other creditor is in the same situation as Laroe, let alone so many creditors that Laroe's intervention would open "the floodgates" as the Town fears. Oral Arg. Tr. 22.

under Rule 24. Indeed, at oral argument the Town wisely conceded that timeliness was not "necessarily where the prejudice would come in[,] in this case." Oral Arg. Tr. 30.

Laroe, on the other hand, claims it would be prejudiced by the denial of its motion to intervene. It invested a significant sum of money into the project and lost that investment allegedly due to the Town's onerous regulatory process. Sherman's estate does not oppose Laroe's intervention. But Laroe informed the District Court that Sherman's widow, the executrix of his estate, was unwilling to pursue the takings claim unless Laroe gave her an "incentive to move the case forward." Laroe's Letter to the District Court, May 28, 2014, ECF No. 16. And on appeal Laroe represents that Sherman's estate is "without funds" and therefore unable or unwilling to pursue the claim. Oral Arg. Tr. 10. Sherman's death, the alleged refusal of his impecunious estate to pursue the takings claim, and the subsequent sale of the foreclosed property might well prejudice Laroe and in any event constitute "unusual circumstances militating for . . . a finding of timeliness." MasterCard, 471 F.3d at 390. The District Court did not address this issue, and on remand it should have the opportunity to do so.

B. An Interest Relating to the Property

Rule 24 next requires the movant to "assert[] an interest relating to the property or transaction that is the subject of the action." Id. at 389. That interest must be "direct, substantial, and legally protectable." Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co., 922 F.2d 92, 97 (2d Cir. 1990). And when the underlying dispute involves a takings claim, the

movant must show that the interest existed at the time the alleged taking occurred.

The parties dispute whether Laroe is an "equitable owner" of the property referenced in the 2003 Agreement under New York law. Each side marshals what appear to be non-frivolous arguments in its favor.[3] See Appellant's Br. 11–13, 22–24 (citing, e.g., Matter of City of New York, 306 N.Y. 278, 282 (1954); Bean v. Walker, 464 N.Y.S.2d 895, 897 (4th Dep't 1983) ("[N]otwithstanding the words of the contract and implications which may arise therefrom, the law of property declares that, upon the execution of a contract for sale of land, the vendee acquires

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[3] Although the Town characterizes the 2003 Agreement as only a "mortgage agreement," Appellee's Br. 17, it appears on its face to be an agreement for the purchase of property. For example, it refers to Sherman as the "Seller" and Laroe as the "Purchaser," and it states that "Seller agrees to sell and convey to Purchaser" certain lots from the proposed subdivision. It is true that Sherman provided a mortgage as security for the $2.5 million Laroe paid him, but structuring the transaction in that way does not necessarily convert the purchase agreement into a loan. At the end of the day, Laroe did not want to be paid back—it wanted the property.

In 2013 Sherman and Laroe agreed that the more than $2.5 million Laroe had already paid Sherman would constitute the purchase price for the property, along with any money Laroe paid to settle Sherman's debts under the TD Bank mortgages. The Town asserts that this additional requirement demonstrates that Laroe did not have a vested interest in the property: it never settled the TD Bank mortgages, so it never held an interest in the land. We disagree. The 2013 Agreement vested Laroe with "the sole discretion" to settle the TD Bank mortgages. Joint App'x at 234. So long as Laroe transferred the required number of lots back to Sherman after the Town approved the subdivision, the 2013 amendment deemed the purchase price "paid in full." Id.

equitable title.")); Appellee's Br. 23–25 (citing Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54, 58 (2d Cir. 1985) ("[T]o have a 'property' interest entitled to Fourteenth Amendment procedural protection[,] a person . . . must have more than a unilateral expectation of it.") (quotation marks omitted)). The record certainly suggests that Sherman intended to sell at least a portion of the proposed development to Laroe. But the Town responds that even if Laroe was the equitable owner, it lacked a "vested property interest" at the time of the alleged taking. Appellee's Br. 24–25. Indeed, one way of thinking about the Town's misguided argument about standing is that it is essentially a challenge to the "interest" requirement of Rule 24(a)(2).[4] But trying to identify the precise nature of Laroe's interest in the property is difficult at this stage of the litigation, when the factual record has not been fully developed. For example, the 2003 Agreement provided for the sale of certain lots within the proposed MareBrook subdivision, but Laroe now claims to be the owner of the entire property. Nor can we conclude, based on the record before us, that Laroe had an interest in the property when the alleged taking occurred because, as Laroe acknowledged at oral argument, the District Court has yet to determine when the Town's conduct allegedly became so onerous that it rose to the level of a taking.

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[4] In particular, both parties frame this appeal as raising a question of standing premised on New York law: whether the "equitable owner" of real property has standing to assert a regulatory takings claim against the town in which the property is located.

None of these uncertainties mean that the Rule 24 motion should have been denied. "Rule 24(a)(2) requires not a property interest but, rather, 'an interest relating to the property or transaction which is the subject of the action.'" Brennan v. N.Y.C. Bd. of Educ., 260 F.3d 123, 130 (2d Cir. 2001) (emphasis added). "An interest that is otherwise sufficient under Rule 24(a)(2) does not become insufficient because the court deems the claim to be legally or factually weak." Id. Here, Laroe's position appears sufficiently tied to Sherman's that the District Court should have considered whether it satisfied the requirements of Rule 24. To be clear, we do not mean to definitively state whether, under New York law, Laroe has a vested interest in the property that would permit it to bring a takings claim against the Town in a separate action. That is not what Rule 24 requires. Instead it asks only whether the proposed intervenor has an "interest in the proceeding" that is "direct, substantial, and legally protectable." Wash. Elec. Coop., 922 F.2d at 97. An interest fails to meet the first two requirements (which are not genuinely disputed by the parties) if it is "remote from the subject matter of the proceeding, or . . . contingent upon the occurrence of a sequence of events." Id. In Washington Electric Cooperative, Inc. v. Massachusetts Municipal Wholesale Electric Co., for example, we held that a state regulatory agency's interest in litigation between two electric companies was not sufficient because it was "based upon a double contingency." Id. The regulatory agency hoped to collect on behalf of ratepayers a portion of any judgment the plaintiff electric company obtained from the defendant. Id. at 95. But in order for the agency to succeed, the plaintiff was first required to

win a judgment against the defendant, and then the agency would have had to convince the Vermont Public Service Board, a nonparty to the dispute, to decide that the ratepayers were entitled to a percentage of the plaintiff's recovery. Id. at 97. "Such an interest," we explained, "cannot be described as direct or substantial." Id.

As to the third requirement that the interest be legally protectable, Laroe appears to have paid in full for the property, and it could have closed on the sale were it not for the alleged regulatory taking at issue in the underlying dispute. Were the District Court to conclude that the Town did in fact commit a regulatory taking, it seems to us that it could potentially provide relief that benefits Laroe. Thus, whether or not Laroe actually holds a form of title to the property, it has made at least a colorable claim at this stage in the litigation that it has an interest relating to the property that is "legally protectable." Id. Of course, additional facts may shed light on the precise nature of this interest. We therefore find it prudent to remand for the District Court to determine in the first instance whether Laroe satisfies the interest requirement of Rule 24, separate and apart from the question of whether it would have standing in its own right. In so doing, it would be important, in our view, for the District Court to express its judgment on whether under New York law Laroe has a "direct, substantial, and legally protectable" interest relating to the property. Id.

C. Remaining Requirements

Rule 24(a)(2) also requires the movant to show that it "is so situated that without intervention, disposition of the action may, as a practical matter,

impair or impede [its] ability to protect its interest," and that its "interest is not adequately represented by the other parties." MasterCard, 471 F.3d at 389. As we have observed, Laroe's ability to protect its interest appears likely to be impaired by a judgment on Sherman's takings claim, since Laroe purports to be the equitable owner of that property. But again, the underdeveloped factual record on appeal makes it difficult for us to determine whether Sherman will adequately represent Laroe's interest—a question the District Court did not address at all. "[T]he burden to demonstrate inadequacy of representation is generally speaking 'minimal,'" Butler, Fitzgerald & Potter v. Sequa Corp., 250 F.3d 171, 179 (2d Cir. 2001) (quoting Trbovich, 404 U.S. at 538 n. 10), and Laroe has represented that Sherman's estate is "without funds" and thus unwilling or unable to pursue the takings claim, Oral Arg. Tr. 10. Still, this assertion conflicts with the estate's continued effort to oppose the Town's second motion to dismiss, which was filed after we remanded Sherman's takings claim back to the District Court. Laroe also admitted that Sherman's estate shared a unity of interest with Laroe with respect to the Town's liability for the alleged taking, though Laroe argued that they may disagree about litigation strategy and on the issue of damages were they to prevail. Oral Arg. Tr. 11. We leave it to the District Court to determine whether, among other things, ending the litigation one way or the other would impair Laroe's ability to protect its interests, and whether Sherman's estate adequately represents those interests.

CONCLUSION

For the foregoing reasons, we vacate the District Court's order of March 31, 2015, insofar as it denied Laroe's motion to intervene, and we remand for further proceedings consistent with this opinion.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

OPINION AND ORDER
12 Civ. 647 (ER)

NANCY J. SHERMAN,

Plaintiff,

v.

TOWN OF CHESTER,
TOWN BOARD OF THE TOWN OF CHESTER, and
PLANNING BOARD OF THE TOWN OF CHESTER,

Defendants.

RAMOS, D.J.:

This matter is once again before the Court on a motion to dismiss brought by the Defendants Town of Chester, New York ("the Town"), the Town Board of the Town of Chester, and the Planning Board of the Town of Chester.[1] (Doc. 21). Steven M.

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[1] This Opinion generally refers to "the Town" rather than "Defendants" because the Planning Board and the Town Board are not suable entities. *See, e.g., S.W. ex rel. J.W. v. Warren*, 528 F. Supp. 2d 282, 302-03 (S.D.N.Y. 2007). Plaintiff argues that he must include these arms of the Town because he has an Article 78 claim. *See* Pl.'s Mem. 27. However, Plaintiff can no longer prosecute his Article 78 claim in this action because it has been removed to federal court. *See, e.g., S&R Dev. Estates, LLC v. Bass*, 588 F. Supp. 2d 452, 464 (S.D.N.Y. 2008) ("An

Sherman,[2] a real estate developer, initially filed this suit on January 12, 2012, in the Supreme Court for Orange County, New York, generally alleging that for over the previous decade, the Town wrongfully obstructed his efforts to develop MareBrook, a 398 acre parcel of land he purchased in 2001 for $2.7 million. Compl. ¶¶ 5, 39, 353.[3] Specifically, Plaintiff claims that by implementing a series of amendments to the local zoning laws that specifically targeted his project, and otherwise engaging in conduct that frustrated his ability to even begin development, the Town violated his rights to freedom of religion, freedom to petition, substantive due process, procedural due process, equal protection, and his right not to have his property taken without just compensation under the federal and New York state constitutions.

Pending before the Court is the Town's renewed motion to dismiss following the Second Circuit's reversal of this Court's determination that Sherman's federal takings claim was unripe. The Town argues that all of Sherman's remaining claims, both federal and state, are time barred, and even if not, fail to state a claim for relief. For the reasons

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Article 78 proceeding must be brought in New York State court."). All claims against the Town Board and Planning Board are therefore dismissed.

[2] Mr. Sherman passed away in October 2013. His widow, Nancy J. Sherman has replaced him as the Plaintiff. For conformity with past decisions, this Court refers to refers to Plaintiff by using masculine pronouns.

[3] Defendants removed the action to this Court on January 26, 2012. Notice of Removal. (Doc. 1).

set forth below, Defendants' motion is GRANTED in part and DENIED in part.

Also before the Court is a motion to intervene brought by Laroe Estates, Inc. ("Laroe"), on the basis that as holder of "equitable title" to MareBrook, Laroe is the owner of the property and therefore has standing to intervene as of right, or at least permissively, under Federal Rule of Civil Procedure 24 (a) and (b), respectively. (Doc. 24). Laroe's motion is DENIED.

I. Background[4]

The background of this case is set forth in great detail in this Court's March 2013 Order, as well as the Second Circuit's decision in *Sherman v. Town of Chester*, 752 F.3d 554 (2014), familiarity with which is assumed. Thus, the Court will only state facts necessary for disposition of the instant motions.

As originally conceived, the MareBrook project was to include 385 residential housing units, a golf course, an equestrian facility, baseball fields, tennis courts, a clubhouse and an on-site restaurant. Compl. ¶ 10. By way of general background, Sherman claims that the Town wrongfully prevented him from developing MareBrook because it variously wanted: (1) to make MareBrook a "*de facto* nature preserve," *id.* at ¶¶ 21, 30, 285, 299; (2) to retaliate against him for instituting several lawsuits against the Town over the development of MareBrook, *id.* at ¶¶ 26-29, 61, 225, 231, 241, 262; and (3) to discriminate against

[4] The following facts are based on the allegations in the SAC, which the Court accepts as true for purposes of the instant motion. *See Koch v. Christie's Int'l PLC*, 699 F.3d 141, 145 (2d Cir. 2012).

him because he is Jewish, one of his business associates is Jewish, and Town residents are worried about MareBrook becoming a Hasidic community, *id.* ¶¶ 31-32, 222, 225, 307-24, 326. Plaintiff concludes that the Town's obstruction shows that a "[s]ecret 'final decision'" was made to block him from developing his property. *Id.* at ¶ 56.

The Town filed its first motion to dismiss on May 7, 2012. (Doc. 6). By Opinion and Order issued on March 20, 2013 (the "March 2013 Order") (Doc. 14), the Court granted the motion, finding that each of Sherman's federal constitutional claims were unripe pursuant to *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), and declining supplemental jurisdiction over Sherman's state claims. Sherman appealed.[5]

As relevant to this motion, Sherman first filed suit in federal court on May 5, 2008. *See Sherman v. Town of Chester et al.*, No. 08-civ-4248 (*"Sherman I"*); Compl. ¶ 218. In that lawsuit, as in the instant one, he alleged a federal takings claim. As the Second Circuit observed, Sherman voluntarily dismissed that action on January 6, 2012,[6] in response to the Town's argument that the takings claim was unripe because Sherman had not alleged that he sought and

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[5] Sherman also made facial and as-applied challenges to a Town law that requires developers to pay the Town's consultants' fees, arguing that it violated state law and Plaintiff's due process rights. In the March 2013 Order, the Court dismissed those claims, finding that Sherman was accorded sufficient procedure. March 2013 Order at 18-24. Sherman did not appeal that finding.

[6] *See* Compl. ¶ 218 fn.9.

was denied just compensation by an available state procedure. *Sherman*, 752 F.3d at 563-64. He then re-filed his federal takings claim and his state law claims for compensation in Supreme Court, Orange County, several days later on January 12, 2012. It was that subsequently filed lawsuit that the Town removed to this Court on January 26, 2012.

In *Sherman v. Town of Chester*, 752 F.3d 554 (2d Cir. 2014), the Second Circuit reversed this Court's determination that Sherman's federal takings claim was unripe. Applying the test stated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the Circuit Court found that Sherman had stated a non-categorical taking. *Sherman*, 752 F.3d at 566. In reaching that conclusion, the Circuit found that the Town's actions "effectively prevented Sherman from making any economic use of this property," interfered with his reasonable investment-backed expectations, and "singled out [his] development, suffocating him with red tape to make sure he could never succeed in developing MareBrook." *Id.* at 565. The Circuit Court then determined that the takings claim was not barred by the three year statute of limitations applicable to claims brought under 42 U.S.C. § 1983. Specifically, the Circuit Court rejected the Town's position that only actions taking place within three years of filing of the complaint should be considered:

> But that argument would mean that a government entity could engage in conduct that would constitute a taking when viewed in its entirety, so long as no taking occurred over any three-year period. We do not accept this. The Town used extreme delay to effect the

> taking. It would be perverse to allow the Town to use that same delay to escape liability.
>
> The only way plaintiffs in Sherman's position can vindicate the Supreme Court's admonition in *Palazzolo* [*v. Rhode Island*, 553 U.S. 606 (2001)], that government authorities 'may not burden property by imposition of repetitive or unfair land-use procedures' is to allow to them aggregate acts that are not individually actionable. *See* 533 U.S. at 621. A claim based on such a 'death by a thousand cuts' theory requires a court to consider the entirety of the government entity's conduct, not such a slice of it. [. . .] [B]ecause Sherman alleges that at least one of the acts comprising the taking occurred within three years of the filing of the case, his claim is not time barred.

Id. at 566-67.

While the Circuit Court did not subject Plaintiff's other constitutional claims—which allege First Amendment, Equal Protection and Due Process violations—to the same analysis, it held that to the extent they had been dismissed solely on ripeness grounds, this Court's ruling can no longer stand. *Id.* at 567. Accordingly, it remanded those claims for the purpose of determining whether Sherman has stated a claim. Finally, the Circuit Court vacated this Court's decision remanding the state law claims because of its determination that Sherman had plausibly stated at least one federal claim. *Id.* at 568.[7]

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[7] The Circuit Court affirmed this Court's decision dismissing (1) Plaintiff's procedural due process claims based on the

II. Discussion

A. 12(b)(6) Motion to Dismiss Standard

When ruling on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014). The court is not required to credit "mere conclusory statements" or "threadbare recitals of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); *see also id.* at 681 (citing *Twombly*, 550 U.S. at 551). "To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). More specifically, the plaintiff must allege sufficient facts to show "more than a sheer possibility that a defendant has acted unlawfully." *Id.* If the plaintiff has not "nudged [his] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 680.

The question in a Rule 12 motion to dismiss "'is not whether a plaintiff will ultimately prevail but

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Town's consultants' fee law and (2) 42 U.S.C. §1981 claims, and denying as futile Plaintiff's request to add a § 1982 claim. Sherman, 752 F.3d at 567.

whether the claimant is entitled to offer evidence to support the claims.'" *Sikhs for Justice v. Nath*, 893 F. Supp. 2d 598, 615 (S.D.N.Y. 2012) (quoting *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 278 (2d Cir.1995)). "[T]he purpose of Federal Rule of Civil Procedure 12(b)(6) 'is to test, in a streamlined fashion, the formal sufficiency of the plaintiff's statement of a claim for relief without resolving a contest regarding its substantive merits,'" and without regard for the weight of the evidence that might be offered in support of Plaintiffs' claims. *Halebian v. Berv*, 644 F.3d 122, 130 (2d Cir. 2011) (quoting *Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 155 (2d Cir. 2006)).

B. Sherman's Federal Constitutional Claims

As a preliminary matter, the Court notes that Sherman overly relies on the Second Circuit's conclusion that his takings claim constitutes a continuing violation. He assumes that each of his federal constitutional claims are saved by the same analysis. He is mistaken. Under the continuing violation doctrine, "[w]here a plaintiff can demonstrate an ongoing or continuing violation of his federally protected rights, the plaintiff is entitled to bring suit challenging all conduct that was part of the violation, even conduct that occurred outside the limitations period." *Ruane v. Cnty. of Suffolk*, 923 F.Supp.2d 454, 459 (E.D.N.Y.2013) (internal quotation marks omitted). "[C]ourts of this circuit consistently have looked unfavorably on continuing violation arguments . . . and have applied the theory only under compelling circumstances." *Id.* (quoting *Blankman v. Cnty. of Nassau*, 819 F.Supp. 198, 207

(E.D.N.Y. 1993)). Where particular acts serve to put a plaintiff on notice of his claim, the continuous violation doctrine is inapplicable, even if there were subsequent acts constituting a violation. *See Kellogg v. N.Y. State Dep't of Corr. Servs.*, No. 07-CV-2804, 2009 WL 2058560, at *1 (S.D.N.Y. July 15, 2009) ("[T]he continuing-violation doctrine does not apply to discrete acts, but only to ongoing circumstances that combine to form a single violation that cannot be said to occur on any particular day."); *see also Libbey v. Vill. of Atl. Beach*, 982 F.Supp.2d 185, 212, No. 13-CV-2717, 2013 WL 5972540, at *20 (E.D.N.Y. Nov. 04, 2013) (no continuing violation even though allegations "span several years" where time-barred conduct was a discrete act occurring on a specific date).

Here, the Second Circuit found that the takings claim was continuing because the facts of this case involved "an unusual series of regulations and tactical maneuvers that constitute a taking when considered together, even though no single component is unconstitutional when considered in isolation." *Sherman*, 752 F.3d at 567. As a result, the Court concluded, it could not be said that Sherman's property was 'taken' on any particular day." *Id.* That determination does not compel the conclusion that each of his other federal constitutional claims are also continuing violations. Certainly, the Circuit Court did not suggest as much. The only finding of general application made by the Circuit Court was that because the takings claim was ripe, the balance of his constitutional claims were also ripe for the same reason. *Id.* The Circuit Court remanded for the limited purpose of

determining whether those allegations stated a claim. Therefore, each claim must be considered individually.

The parties agree that a three year statute of limitations applies to Sherman's federal constitutional claims. *See* Mem. L. Supp. Def.'s 2d. Mot. Dismiss ("Def.'s Mem.") (Doc. 23) at 17-18; Mem. L. Opp. Def.'s 2d. Mot. Dismiss ("Pl.'s Mem.") (Doc. 33) at 4; *see also Lynch v. Suffolk Cnty. Police Dep't, Inc.*, 348 F. App'x. 672, 674 (2d Cir. 2009) (summary order) (the statute of limitations for a § 1983 action arising in New York is three years). Under federal law, a claim arising under § 1983 "accrues" when the plaintiff "knows or has reason to know of the injury which is the basis of his action." *Pearl v. City of Long Beach*, 296 F.3d 76, 80 (2d Cir. 2002). Accordingly, the Town argues that because this action was filed on January 12, 2012, any cause of action that accrued before January 12, 2009, is barred. Sherman, however, argues that the limitations period should be measured by reference to the filing date of *Sherman I*—May 5, 2008—such that any claim that accrued on or after May 5, 2005, is timely. More broadly, Sherman argues that because the Second Circuit determined that his takings claim constituted a "continuous violation," *Sherman*, 752 F.3d at 566-67, the balance of his federal claims necessarily constitute continuous violations as well. According to Sherman, therefore, any act comprising a violation that occurred on or after May 5, 2005, is timely, even if the violation began earlier.

i. The Tolling Provision of Section 1367(d)[8]

Sherman argues that because he voluntarily dismissed his federal complaint in *Sherman I*, which included pendent state causes of action, the tolling provision of 18 U.S.C. § 1367(d) applies to his claims. Section 1367(d) of Title 28 expressly provides in relevant part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties. [. . .]
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

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[8] The Circuit Court, having determined that Sherman's takings claim constituted a "continuous violation," declined to reach the issue of whether the limitations period is tolled under § 1367(d). *Sherman*, 752 F.3d at 567.

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after ***the dismissal*** **of the claim under subsection** ***(a)***, unless State law provides for a longer tolling period.

28 U.S.C. §1367 (emphasis added).

At first glance, the text of subsection (d), on its face, would appear to provide that *any* other claim that is dismissed at the same time as or after the dismissal of the pendent state claim *shall be tolled*. Fed. R. Civ. P. §1367(d). Upon closer reading, however, there is an ambiguity in the statute that has created substantial confusion concerning whether the tolling provision provided in subsection (d) applies *only* to those pendent claims dismissed pursuant to one of the four circumstances described in subsection (c), or whether it also applies to situations where the pendent claims were dismissed for any other reason, for example, as here, voluntarily pursuant to Fed. R. Civ. P. 41. *See*, 13D Wright, Miller, et al., *Federal Practice and Procedure* § 3567.4 (3d ed. 2008) ("Wright & Miller") (noting that the confusion is the result of "poor drafting").

In *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533 (2002), the Supreme Court analyzed whether

§ 1367(d) applied to dismissals of claims not specifically listed in § 1367(c), acknowledging the lack of clarity in the statute. In that case the underlying dismissal was based on the defendant's Eleventh Amendment immunity. The Court determined that the tolling provision did not apply. The Court did so in part because Congress did not state clearly that the statute should apply to dismissals based on grounds other than those specifically enumerated in § 1367(c):

> The question then is whether § 1367(d) states a clear intent to toll the limitations period for claims against nonconsenting States that are dismissed on Eleventh Amendment grounds. Here the lack of clarity is apparent in two respects. With respect to the claims the tolling provision covers, one could read § 1367(d) to cover any claim "asserted" under subsection (a), but we have previously found similarly general language insufficient to satisfy clear statement requirements. For example, we have held that a statute providing civil remedies for violations committed by "'*any* recipient of Federal assistance'" was "not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment" even when it was undisputed that a state defendant was a recipient of federal aid. *Atascadero*, 473 U.S., at 245-246 [] (quoting 29 U.S.C. § 794a(a)(2) (1982 ed.) (emphasis in original)). Instead, we held that "[w]hen Congress chooses to subject the States to federal jurisdiction, it must do so specifically." 473 U.S., at 246 []. Likewise,

§ 1367(d) reflects no specific or unequivocal intent to toll the statute of limitations for claims asserted against nonconsenting States, especially considering that such claims do not fall within the proper scope of § 1367(a) as explained above.

With respect to the *dismissals* the tolling provision covers, one could read § 1367(d) in isolation to authorize tolling regardless of the reason for dismissal, but § 1367(d) occurs in the context of a statute that specifically contemplates only a few grounds for dismissal. The requirements of § 1367(a) make clear that a claim will be subject to dismissal if it fails to "form part of the same case or controversy" as a claim within the district court's original jurisdiction. Likewise, § 1367(b) entails that certain claims will be subject to dismissal if exercising jurisdiction over them would be "inconsistent" with 28 U.S.C. § 1332 (1994 ed. and Supp. V). Finally, § 1367(c) (1994 ed.) lists four specific situations in which a district court may decline to exercise supplemental jurisdiction over a particular claim. Given that particular context, it is unclear if the tolling provision was meant to apply to dismissals for reasons unmentioned by the statute, such as dismissals on Eleventh Amendment grounds. *See Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 [] (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme").

> In sum, although § 1367(d) may not clearly exclude tolling for claims against nonconsenting States dismissed on Eleventh Amendment grounds, we are looking for a clear statement of what the rule includes, not a clear statement of what it excludes. *See Gregory, supra*, at 467 []. Section 1367(d) fails this test. As such, we will not read § 1367(d) to apply to dismissals of claims against nonconsenting States dismissed on Eleventh Amendment grounds.

Id. at 544-46 (emphasis in original); *see also*, Wright & Miller § 3567.4 ("It seems that Congress intended [§1367(d)] to apply only to dismissals under §1367(c). Its inability to say so clearly creates confusion and wasteful litigation.")

Similarly, in one of only three cases identified by the parties or the Court concerning the application of § 1367(d) in the context of the voluntary dismissal, the district court for the Southern District of Ohio referenced the legislative history of the § 1367 and noted "§ 1367(d) 'provides a tolling of statutes of limitations for any *supplemental claim* that is dismissed *under this section* and for any other claims in the same action voluntarily dismissed at the same time or after the supplemental claim is dismissed.'" *Parris v. HBO & Co.*, 85 F. Supp.2d 792, 796 (S.D. Ohio 1999) (quoting H.R.Rep. No. 734, 101st Cong., 2d Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 6860, 6876) (emphasis added). In accordance with that legislative history, the court reasoned that Congress did not intend the phrase "'the dismissal' to include dismissal of the supplemental state claim by *any* procedure but, rather, dismissal pursuant to §1367(c),

which provides four circumstances under which the district court may decline to exercise supplemental jurisdiction[.]" *Id.*[9] The Court therefore found that "for § 1367(d) to be applicable, the supplemental claim brought pursuant to § 1367(a) must have been dismissed by the court pursuant to § 1367(c)." *Id.* at 797. Because the "[p]laintiff 's state law claims were voluntarily dismissed pursuant to Fed. R. Civ. P. 41(a)(1) . . . and not pursuant to 28 U.S.C. § 1367(c)[,] the [p]laintiff cannot avail himself of 1367(d)." *Id.*

Based on the foregoing authority,[10] the Court finds that in order for Sherman to be entitled to the benefit of the tolling provision of § 1367(d), *Sherman I* must have been dismissed pursuant to § 1367(c). Because there is no dispute that *Sherman I* was voluntarily dismissed pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i), a circumstance not contemplated by § 1367(c), Sherman's federal constitutional claims must have accrued on or after January 12, 2009.

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[9] The sole case identified by the Court that affirmatively found that voluntary dismissals are entitled to the benefit of §1367(d) tolling, also from the Southern District of Ohio, provides little analysis. *See Naragon v. Dayton Power & Light Co.*, 934 F. Supp. 899 (S.D. Ohio 1996). The third case, *Zychek v. Kimball International Marketing, Inc.*, 2006 WL 1075452 (April 21, 2006 D. Idaho), adopts the reasoning of *Parris*.

[10] Sherman cites no contrary case authority.

ii. The First Amendment Claim Time Bar[11]

At the outset, Plaintiff's First Amendment claims do not constitute a continuing violation because they are based on identifiable, discrete acts by the Town that were readily discerned by Sherman at the time the acts were taken. As the Circuit noted in *Deters v. City of Poughkeepsie*, 150 F. App'x 10, 12 (2d Cir. 2005), "[t]he Supreme Court recently clarified that the continuing-violations doctrine does not apply to discrete acts, but only to ongoing circumstances that combine to form a single violation that "cannot be said to occur on any particular day." (citation omitted). The *Deters* court concluded that "[t]he mere fact that the effects of retaliation are continuing does not make the retaliatory act a continuing one." Thus, in order to be timely, Sherman must plausibly allege a retaliatory act within the applicable limitations period, i.e., on or after January 12, 2009. *Id.* Here, Sherman plausibly alleges that after he filed his first federal complaint and later amended it in 2010,[12] "for many

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[11] This Court previously dismissed Sherman's First Amendment freedom of religion claim as frivolous, *see* March 2013 Order at 16; a determination that he did not challenge on appeal. The Circuit Court also noted that Sherman's allegations that the Town discriminated against him because he was Jewish were "insufficient." *Sherman*, 752 F.3d at 567. Accordingly, the only basis for Sherman's First Amendment claim is pursuant to the petition clause.

[12] The Court does not construe Sherman's subdivision application, nor his subsequent revised applications, to be "petitions" for First Amendment purposes. *Ridgeview Partners, LLC v. Entwhistle*, 227 Fed. App'x 80, 82 (2d Cir 2007) (site-plan application does not purport "to complain to public officials [or] to seek administrative [or] judicial relief from their actions").

months . . . during 2009, 2010, and 2011 . . . [t]he Planning Board . . . refused to allow him on its agenda, or appear otherwise." Compl. ¶ 383. Thus, his claim survives if it otherwise states a claim. Here, Sherman has stated a plausible First Amendment retaliation claim.

iii. First Amendment Retaliation Claim

To plead a First Amendment retaliation claim, a plaintiff must show: "(1) he has a right protected by the First Amendment; (2) the defendant's actions were motivated or substantially caused by his exercise of that right; and (3) the defendant's actions caused him some injury." *Dorsett v. Cnty. of Nassau*, 732 F.3d 157, 160 (2d Cir.2013). On a motion to dismiss, the court "must be satisfied that such a claim is supported by specific and detailed factual allegations, which are not stated in wholly conclusory terms." *Velez v. Levy*, 401 F.3d 75, 97 (2d Cir. 2005) (internal quotation marks omitted).

In the Second Circuit, the viability of a prima facie First Amendment retaliation claim depends on the factual circumstances giving rise to the claim. *Zherka v. Amicone*, 634 F.3d 642, 643 (2d Cir. 2011); *see also Williams v. Town of Greenburgh*, 535 F.3d 71, 76 (2d Cir. 2008) ("We have described the elements of a First Amendment retaliation claim in several ways, depending on the factual context.") (citations omitted). "Private citizens alleging retaliation for their criticism of public officials" are generally required to show that "they engaged in protected speech, persons acting under color of state law took adverse action against them in retaliation for that speech, and the retaliation resulted in 'actual chilling' of their exercise of their constitutional right to free

speech." *Zherka*, 634 F.3d at 643. To prove the "actual chilling" element, it is not enough for the plaintiff to show that she changed her behavior in some way; she "must show that the defendant intended to, and did, prevent or deter [her] from exercising [her] rights under the First Amendment." *Hafez v. City of Schenectady*, 894 F. Supp. 2d 207, 221 (N.D.N.Y. 2012), *aff'd*, No. 12 Civ. 1811 (JSR), 2013 WL 1876610 (2d Cir. 2013).

However, in other private citizen cases, various forms of concrete harm have been substituted for the "actual chilling" requirement. *Zherka*, 634 F.3d at 643, 645-46; *see also Puckett v. City of Glen Cove*, 631 F. Supp. 2d 226, 239 (E.D.N.Y. 2009) (chilling element is required only "in cases where a plaintiff states no harm independent of the chilling of his speech"); *Tomlins v. Vill. of Wappinger Falls Zoning Bd. of Appeals*, 812 F. Supp. 2d 357, 371 (S.D.N.Y. 2011) (deeming allegations of retaliatory denial of building permits and a denial of an unconditional variance sufficient concrete harms to substitute for chilling effects); *Hafez*, 894 F. Supp. 2d at 222 (citing *Gagliardi v. Village of Pawling*, 18 F.3d 188 (2d Cir. 1994)) (alleging harm in the form of municipal defendants' misapplication of zoning code in retaliation for plaintiffs' exercise of free speech right).

Where a plaintiff has sufficiently alleged a concrete harm, and in the absence of a subjective chilling requirement, Second Circuit courts have only required a showing (1) that the First Amendment protected the plaintiff's conduct, and (2) that "defendants' conduct was motivated by or substantially caused by [the plaintiff's] exercise of speech." *Hafez*, 894 F. Supp. 2d at 222 (citing

Gagliardi, 18 F.3d at 194) (citation omitted); see also *Tomlins*, 812 F. Supp. 2d at 371 n.11. In light of the Circuit Court's opinion that the Town "singled out Sherman's development, suffocating him with red tape" over the course of a decade to "make sure he could never succeed in developing MareBrook," *Sherman* 752 F.3 at 565, that showing would appear to be easily met here. *See Tomlins*, 812 F. Supp. 2d 357, 375 (noting that where there is evidence that the defendant engaged in an "ongoing course of adverse action" against the plaintiff, such action may serve as additional evidence of retaliatory intent); *see, e.g.*, *Economic Opportunity Commission*, 106 F. Supp.2d 433, 437 (E.D.N.Y. 2000) ("[A] plaintiff can also show retaliatory intent by establishing . . . an ongoing campaign of adverse action."); *Hous. Works, Inc. v. City of New York*, 72 F. Supp. 2d 402, 426 (S.D.N.Y. 1999) ("Evidence of a 'pattern of antagonism' or of prior retaliatory conduct may serve as circumstantial evidence of retaliation."); *cf. Gagliardi*, 18 F.3d at 195 (motive adequately alleged by evidence that Village repeatedly refused plaintiffs' requests to enforce zoning codes and ordinances over a nine-year period). Sherman has established the requisite nexus.

Accordingly, the Town's motion to dismiss the First Amendment retaliation claim is DENIED.

iv. Due Process Claims Time Bar

As with his First Amendment claims, Sherman's due process claims do not constitute a continuing violation because they too are based on discrete acts by the Town that were readily discerned by Sherman at the time the acts were taken. *Deters*, 150 F. App'x at 12; *Libbey v. Village of Atlantic Beach*, 982

F. Supp.2d 185, 212 (E.D.N.Y. 2013) ("where . . . [p]laintiffs can identify particular periods of time and circumstances . . . they have merely alleged isolated acts, which [p]laintiffs could have recognized as actionable at the time); *Pearl v. City of Long Beach*, 296 F.3d 76, 80 (2d Cir. 2002) (a claim arising under § 1983 "accrues" when the plaintiff "knows or has reason to know of the injury which is the basis of his action"). Because the cognizable acts that he relies on all took place prior to January 12, 2009, his due process claims are barred. *See Fair Housing in Huntington Comm. V. Town of Huntington*, 2010 WL 2730757 (E.D.N.Y. July 8, 2010) (finding no continuing violation where harms arose out of discrete decisions of the zoning board beyond the statutory period). However, even if the Court were to consider them on the merits, both the procedural and substantive due process claims would still fail.

v. Procedural Due Process Claim

In order to bring a claim for violation of the procedural due process rights guaranteed by the Fourteenth Amendment, a plaintiff must show "(1) that he possessed a protected liberty or property interest; and (2) that he was deprived of that interest without due process." *Rankel v. Town of Somers*, 999 F. Supp.2d 527, 545 (S.D.N.Y. 2014); *Rehman v. State Univ. of N.Y. at Stony Brook*, 596 F.Supp.2d 643, 656 (E.D.N.Y. 2009); *accord Nnebe v. Daus*, 644 F.3d 147, 158 (2d Cir. 2011). A party asserting a deprivation of due process must first establish a property interest within the meaning of the Constitution. In the context of a zoning dispute, the party must demonstrate that it had a valid property interest in a benefit protectable under the

Fourteenth Amendment at the time of the alleged deprivation. *See Zahra v. Town of Southold*, 48 F.3d 674, 680 (2d Cir. 1995).

To possess a federally protected property interest, a person must have a "legitimate claim of entitlement to it." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *Zahra*, 48 F.3d at 680 (quoting *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 915 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989)), and *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 58 (2d Cir. 1985)). Such a claim does not arise from the Constitution, but rather from an independent source such as state or local law. *See id.*; *Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 629 (2d Cir. 1996); *G.I. Home Developing Corp. v. Weis*, No. 07-CV-4115 (DRH), 2009 WL 962696, at *5 (E.D.N.Y. Mar. 31, 2009). "An abstract need, desire or unilateral expectation is not enough." *Abramson v. Pataki*, 278 F.3d 93, 99 (2d Cir. 2002) (citing *Roth*, 408 U.S. at 577). In addition, as a matter of law, a party has "no assurance that the zoning regulations [will] remain unchanged." *Sag Harbor Port Assocs. v. Village of Sag Harbor*, 21 F. Supp.2d 179, 183 (E.D.N.Y.1998), *aff'd*, 182 F.3d 901 (2nd Cir. 1999). "The [strict entitlement] analysis focuses on the extent to which the deciding authority may exercise discretion in arriving at a decision, rather than on an estimate of the probability that the authority will make a specific decision." *Zahra*, 48 F.3d at 680 (collecting cases). "Even if in a particular case, objective observers would estimate that the probability of issuance was extremely high, the opportunity of the local agency to deny issuance

suffices to defeat the existence of a federally protected property interest." *RRI Realty*, 870 F.2d at 911.

It is beyond cavil that the Town here has vested the Town Planning Board with broad discretion to review subdivision applications. *See* New York Town Law § 276; *see also Masi Management, Inc. v. Town of Ogden*, 180 Misc.2d 881, 691 N.Y.S.2d 706 (N.Y. Sup., 1999), *aff'd*, 273 A.D.2d 837, 709 N.Y.S.2d 734, 2000 N.Y. Slip Op. 06153 (N.Y.A.D. 4 Dept. Jun 16, 2000) ("Town Law § 276 . . . [has] been held to confer wide enough discretion on town officials to preclude a claim of entitlement sufficient to create a property interest cognizable under the substantive due process doctrine.") (citing *Honess 52 Corp. v. Town of Fishkill*, 1 F.Supp.2d 294, 304 (S.D.N.Y.1998)). Sherman does not argue otherwise. Instead, Sherman assumes that the Second Circuit's decision is dispositive on his due process claim and further argues that the due process violations—both procedural and substantive—are established through the administrative delay and concomitant expenses he suffered. His arguments are unavailing.

As the Second Circuit has recently held, failure to institute an Article 78 proceeding to mandamus the Town to act on his application forecloses a procedural due process claim based on delay. *See Nenninger v. Village of Port Jefferson*, 509 F. App'x. 36, 39 fn.2 (2d Cir. 2013) ("To the extent Nenninger argues that a failure to rule on his application—complete or incomplete—denied him procedural due process, the claim fails in any event because Nenninger was free to bring an Article 78 mandamus proceeding in New York State court.") (citations omitted)). As the Town

notes, Sherman's reliance on *Kuck v. Danaher*, 600 F.3d 159 (2d Cir. 2010), is misplaced, as that case involved the issuance of a firearm under Connecticut law, and specifically noted that the outcome might have been different under New York law because of the discretion afforded by New York law to issue gun permits.

In addition, to the extent Sherman premises a due process violation on the expenses he incurred in preparing his plan, the claim must fail because such a claim is generally not recognized in New York. *See Cedarwood Land Planning v. Town of Schodack Through Schodack Planning Bd.*, 954 F.Supp. 513, 521 (N.D.N.Y. 1997) ("[i]t is well established that, as a general rule, expenses incurred prior to the commencement of the actual construction do not create a vested interest." (citing *McBride v. Town of Forestburgh*, 54 A.D.2d 396, 388 N.Y.S.2d 940, 942 (3d Dep't 1976); *Cooper v. Dubow*, 41 A.D.2d 843, 342 N.Y.S.2d 564, 566 (2d Dep't 1973)).

Moreover, Sherman has not established that he had a vested property interest in receiving personal notice of zoning changes. In *Alzamora v. Village of Chester*, 492 F. Supp.2d 425 (S.D.N.Y. 2007), this court considered a procedural due process challenge based on the Village's failure to personally notify a landowner of proposed zoning changes. The court held that absent a vested interest in the property, such notice was not required: "It is axiomatic that, '[u]nder New York law, a property owner has no right to the existing zoning status of his land unless his right has become 'vested.'" 492 F. Supp. at 430 (citing *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 130 (2d Cir.1998)). In *DLC Mgmt.*

Corp., the Second Circuit explained the requirements for establishing vesting:

> In order for a right in a particular zoning status to vest, a property owner must have undertaken substantial construction and must have made substantial expenditures prior to the enactment of the more restrictive zoning ordinance. Where . . . there has been no construction or other change to the land itself," a property owner has no right to complete a project permitted under an earlier zoning classification.

163 F.3d at 130 (quoting *In the Matter of Pete Drown Inc. v. Town Board of the Town of Ellenburg*, 229 A.D.2d 877, 879, 646 N.Y.S.2d 205, 206 (3d Dep't 1996)) (internal citation and quotation marks omitted). Because Sherman has not undertaken any construction on the property, he cannot establish entitlement to personal notice on the ground of a vested right.

Finally, while Sherman avers that he was specifically targeted by the Town, has not alleged, nor could he, that the zoning changes of which he complained *only* applied to his property. Cf. Harris v. County of Riverside, 904 F.2d 497, 502 (9th Cir. 1990) (noting that zoning laws "would not ordinarily give rise to constitutional procedural due process requirements," but that singling out plaintiff's property there required personal notice).

vi. Substantive Due Process Claim

To plead a substantive due process claim, a plaintiff must allege facts establishing (1) a cognizable property interest (2) that was invaded in

an arbitrary and irrational manner. *See O'Mara v. Town of Wappinger*, 485 F.3d 693, 700 (2d Cir. 2007); *Natale v. Town of Ridgefield*, 170 F.3d 258, 262-63 (2d Cir. 1999). A plaintiff must plead governmental conduct that "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Velez*, 401 F.3d at 93 (internal quotation marks omitted). Moreover, "[w]here another provision of the Constitution provides an explicit textual source of constitutional protection, a court must assess a plaintiff's claims under that explicit provision and not the more generalized notion of substantive due process." *Kia P. v. McIntyre*, 235 F.3d 749, 757-58 (2d Cir. 2000) (internal quotation marks omitted).

For the reasons stated in the preceding section, Sherman does not state a substantive due process claim because he is unable to establish a cognizable property interest. But even assuming that Plaintiff had a property interest, he fails to state a substantive due process claim because he has not alleged that the Town and its conspirators engaged in conduct that is "so egregious, so outrageous" as to shock the conscience. *Velez*, 401 F.3d at 93. Plaintiff asserts that the Town has failed to approve his application to develop his property in order (1) to make MareBrook a "de facto nature preserve," and (2) to retaliate against him for instituting several lawsuits against the Town over his application. These types of allegations of "improper motives" and "selective enforcement" on the part of municipal officials fall into the "non-conscience-shocking categor[y.]" *Ruston v. Town Bd. of Skaneateles*, No. 06-CV-927, 2008 WL 5423038, at *5 (N.D.N.Y.

Dec. 24, 2008); *see Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 285-86 (3d Cir. 2004). Plaintiff's incantation of the words "arbitrary and irrational" is insufficient. *See Twombly*, 550 U.S. at 555 ("formulaic recitations" of elements of claim "will not do"). Substantive due process does not forbid even "arbitrary or capricious" administrative conduct "correctable in state court." *See Ceja v. Vacca*, 503 F. App'x. 20, 21 (2d Cir. 2012) (summary order) (internal quotation marks omitted).

And even if this conduct were egregious, Plaintiff's claim would fail because the substance of his allegations mirror his First Amendment and takings claims, which have already been deemed to survive. *See Rother v. NYS Dep't of Corr. & Cmty. Supervision*, 970 F.Supp.2d 78, 100, No. 12-CV0397, 2013 WL 4774484, at *13 (N.D.N.Y. Sept. 04, 2013) (dismissing claim that "overlaps" with First Amendment, procedural due process and equal protection claims).

Accordingly, Sherman's procedural and substantive due process claims are DISMISSED.

vii. Equal Protection Claims[13]

An Equal Protection claim accrues when the plaintiff "knows or has reason to know" of the harm. *See Cullen v. Margiotta*, 811 F.2d 698, 725 (2d Cir.

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[13] Sherman premises his Equal Protection claim, in part, on his status as a Jewish developer, and animus against the Jewish religion. Compl. ¶¶ 422-434. As indicated above, *supra* fn.10, this Court has previously dismissed his First Amendment freedom of religion claim as frivolous and the Second Circuit deemed his allegations that he was discriminated against because he was Jewish as "insufficient." *Sherman*, 752 F.3d at 567.

1987), *cert. denied*, 483 U.S. 1021 (1987). "[T]he proper focus is on the time of the discriminatory act, not the point at which the consequences of the act becomes painful." *Eagleston v. Guido*, 41F.3d 865, 871 (2d Cir. 1994) (citing *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981). In *Singleton v. City of New York*, 632 F.2d 185 (2d Cir. 1980), *cert. denied*, 450 U.S. 920 (1981), the Second Circuit noted:

> The crucial time for accrual purposes is when the plaintiff becomes aware that he is suffering from a wrong for which damages may be recovered in a civil action. To permit him to wait and toll the running of the statute simply by asserting that a series of separate wrongs were committed pursuant to a conspiracy would be to enable him to defeat the purpose of the time-bar, which is to preclude the resuscitation of stale claims.

Id. at 192. Here, Sherman's Equal Protection claims arise from discrete actions the Town is alleged to have taken which treated his application differently from that of similarly situated developers. All of the cognizable actions, however, took place before January 12, 2009. As with the due process claims, moreover, this one would also fail if not barred.

The Equal Protection clause of the Fourteenth Amendment commands that "all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). As a preliminary matter, Sherman premises his Equal Protection claim, in part, on his status as a Jewish developer, and animus against the Jewish religion. Compl. ¶¶ 422-434. As indicated above, *supra* fn.10,

this Court previously dismissed his First Amendment freedom of religion claim as frivolous, and the Second Circuit deemed his allegations that he was discriminated against because he was Jewish as "insufficient." *Sherman*, 752 F.3d at 567. Specifically, the Circuit noted:

> He states that the "municipal Defendants" knew that he was Jewish, and that at a Town Board meeting, he heard Town citizens express fear that MareBrook might become a "Hassidic Village" like the nearby Kiryas Joel. He also alleges that a "model home was vandalized with a spray-painted swastika." However, none of this is linked to any Town official. Nor does he allege that any similarly situated non-Jews were treated differently.

Id. Accordingly, for the same reasons his First Amendment and § 1982 claims fail, his Equal Protection claim must also fail to the extent it alleges discrimination based on religion.

Plaintiff also bases his Equal Protection claim on a "class of one" theory," which consists of: (1) intentional disparate treatment, (2) from other similarly situated individuals, (3) without a rational basis for the difference in treatment, and (4) without otherwise claiming membership in a particular class or group. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The Court of Appeals has made clear that, in a "class of one" case, "plaintiffs must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves." *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006). That is because, in such cases, similarity "is offered to provide an inference that the

plaintiff was intentionally singled out for reasons that so lack any reasonable nexus with a legitimate governmental policy that an improper purpose—whether personal or otherwise—is all but certain." *Neilson v. D'Angelis*, 409 F.3d 100, 105 (2d Cir. 2005), overruled on other grounds by *Appel v. Spiridon*, 531 F.3d 138 (2d Cir. 2008) (per curiam). A plaintiff is required to show that (1) "no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy;" and (2) "the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendants acted on the basis of a mistake." *Ruston v. Town Bd. for Town of Skaneateles*, 610 F.3d 55, 60 (2d Cir. 2010) (quoting *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006)).

In order to adequately allege an equal protection claim on a "class of one" theory, a plaintiff must demonstrate (1) that he was "intentionally treated differently from others similarly situated," and (2) "that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (*per curiam*); *see also Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591 (2010) (examining Olech's reasoning and determining that it does not apply to public employment cases). Stated differently, a plaintiff asserting a "class of one" equal protection claim must allege that the intentional disparate treatment was "wholly arbitrary" or "irrational." *Aliberti v. Town of Brookhaven*, 876 F. Supp. 2d 153, (E.D.N.Y. 2012) (citing Giordano v. City of New York, 274 F.3d 740,

751 (2d Cir. 2001)). The Second Circuit has made clear that both elements of a "class of one" equal protection claim—intentional disparate treatment and lack of rational basis—must be analyzed by comparing the plaintiff to those who are similarly situated. *Neilson*, 409 F.3d at 105.

Without adequate comparators, it is impossible to determine whether there was a legitimate basis for the alleged disparities between Defendants' specific actions with respect to Plaintiff's property and purportedly similar properties or developers. As the Town points out, Sherman utterly fails to identify a *single* other developer that is sufficiently similar to him in terms of the size, nature and scope of the proposed project, or who was subject to the same regulatory regime, much less any other developer with the requisite extremely high degree of similarity to him or his property. *See* Pl.'s Reply Mem. (Doc. 37) at 16; *see also Adam J. v. Village of Greenwood Lake*, 10-CV-1753 (CS), 2013 WL 3357174, at *7 (S.D.N.Y. 2013) (dismissing "class of one" claim where developer failed to identify comparator developing a project that was "identical in all relevant respects" to his own). Plaintiff concedes as much, acknowledging, for example, that his proposal included an on-site golf course and other recreational facilities while the others did not,[14] and that other developers were subject to different zoning requirements. Pl.'s Mem. 27. Since Plaintiff is unable to identify materially similar, let alone identical comparators, the Court's analysis cannot

[14] Though Sherman calls this a "distinction without a difference." Plf.'s Mem. 27.

proceed. Given that Plaintiff has failed to show "an extremely high degree of similarity between themselves and the persons to whom they compare themselves[,]" *Clubside*, 468 F.3d at 159, he cannot sustain an equal protection claim under a "class of one" theory.

Finally, to the extent Sherman bases his Equal Protection Claim on so called "exclusionary zoning," that claim also fails. As the Town points out, even if the claim were cognizable,[15] the only zoning changes at issue were passed between 2003 and 2007, well beyond the limitations period.

Accordingly, Sherman's Equal Protection claim is DISMISSED.

C. Sherman's State Claims

Sherman's sixth through eighth causes of action allege violations of the New York State Constitution;[16] ultimately each one fails on one or more bases. First, his state constitutional claims were subject to the notice requirements of General Municipal Law §§ 50-e and 50-i and Town Law § 67. Sherman did not file his notice of claim until October 6, 2011. *See* Cardoso Dec. Ex. DD. Thus, his

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[15] The claim would also fail because it was not included in the notice of claim as required by Town Law § 67. *See* Notice of Claim submitted by Steven M. Sherman, Exhibit DD to the Declaration of Anthony Cardoso ("Cardoso Dec.") (Doc. 22); *see also Montano v. City of Watervliet*, 47 A.D.3d 1106, 1111 (3d Dep't 2008).

[16] The sixth cause of action alleges a violation of the Equal Protection clause. Compl. ¶¶ 444-47. The seventh cause of action alleges violations of freedom of religion, due process and the right to petition. *Id.* at ¶¶ 448-52. The eighth cause of action alleges a violation of the takings clause. *Id.* at ¶¶ 453-56.

Equal Protection, due process and freedom of religion claims are barred to the extent, as here, that they accrued nintey days prior the filing of the notice. Second, the equal protection, exclusionary zoning and spot zoning claims are nowhere included in the notice, *id.*, thereby divesting this Court of subject matter jurisdiction over those claims. *423 S. Salina St. v City of Syracuse*, 68 N.Y.2d 474, 488-89 (N.Y. 1986), *cert. denied*, 481 U.S. 1008 (1987). Third, there is no private right of action for violations of the New York State Constitution where, as here, alternative remedies exist pursuant to, for example, 42 U.S.C. § 1983 and Article 78. *See Flores v. City of Mount Vernon*, 41 F. Supp.2d 439, 447 (S.D.N.Y. 1999) (finding no private right of action for violations of the New York State Constitution where a plaintiff has alternative damage remedies available § 1983); *see also Ken Mar Dev., Inc. v. Dep't of Pub. Works of City of Saratoga Springs*, 53 A.D.3d 1020, 1025, 862 N.Y.S.2d 202, 206 (3d Dep't 2008) (finding the injunctive and declaratory relief available to petitioner pursuant to CPLR article 78 provides an adequate alternative remedy, rendering the recognition of a constitutional tort unnecessary to effectuate the purposes of the State constitutional protections). Finally, because Sherman's complaints concern the exercise of discretionary acts, the Town is entitled to immunity from his state law claims. *Haddock v. City of New York*, 75 N.Y.2d 478, 484 (1990) (*citing*, *Tango v. Tulevich*, 61 N.Y.2d 34, 40 (1983).

Accordingly, all of Sherman's state law claims are DISMISSED.[17]

D. Laroe's Motion to Intervene

Laroe has moved to intervene as a matter of right pursuant to Rule 24(a)(2) or, alternatively, permissively, pursuant to Rule 24(b). Rule 24(a)(2) provides in relevant part:

> On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). Intervention as a matter of right requires an applicant to: (1) file a timely motion; (2) show an interest in the litigation; (3) show that its interest may be impaired by the disposition of the action; and (4) show that its interest is not adequately protected by the parties to the action. *Grewal v. Cueno*, No. 13 Civ. 6836 (RA) (HBP), 2014 WL 2095166, at *3 (S.D.N.Y. May 20, 2014) (quoting *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 197 (2d Cir. 2000)). Rule 24(b) also provides for permissive intervention "[u]pon timely application . . . when an applicant's claim or defense and the main actions have a question of law or fact in common." Fed. R. Civ. P. 24(b)(2). Substantially the same factors as intervention of right are

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[17] Sherman requests leave to re-serve the notice of claim or to deem it timely *nunc pro tunc*. For the reasons set forth above, granting the request would be futile.

considered in determining whether to grant an application for permissive intervention pursuant to Rule 24(b)(2). *Grewal*, 2014 WL 2095166, at *3 (quoting *In re Bank of N.Y. Derivative Litig.*, 320 F.3d 291, 300 (2d Cir. 2003)).

Laroe contends that by virtue of its status as contract vendee, it has equitable title in the property, which it claims to be "synonymous with true ownership" under New York law. Laroe Reply Mem. L. 2. Defendants, on the other hand, argue that Laroe's intervention in this case would be futile because contract vendees lack standing to assert a takings claim, and that Laroe did not in fact have equitable title to the property. Defs. Opp. Mem. L. 9, 11.

Although legal futility is not mentioned in Rule 24, courts have held that futility is a proper basis for denying a motion to intervene. *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, Nos. 02 MDL 1484 (JFK), 02 Civ. 8472 (JFK), 2008 WL 2594819, at *5 (S.D.N.Y. June 26, 2008) (citing sources). In determining whether the proposed intervention is futile, the Court must view the application on the tendered pleadings—that is, whether those pleadings allege a legally sufficient claim or defense and not whether the applicant is likely to prevail on the merits. *Id.* (quoting *Williams & Humbert, Ltd. v. W & H Trade Marks, Ltd.*, 840 F.2d 72, 74 (D.C. Cir. 1988)). Thus, in considering the sufficiency of Laroe's proposed complaint, the Court employs the same standards as it would apply in considering a motion to dismiss for failure to state a valid claim. *Id.* Specifically, the Court must accept all allegations in the proposed complaint as true; it is

not required, however, to accept as true conclusory allegations or a legal conclusion couched as a factual allegation. *Id.* (internal quotation marks and citations omitted).

The Second Circuit has held that "[o]nly the owner of an interest in property at the time of the alleged taking has standing to assert that a taking has occurred." *U.S. Olympic Comm. v. Intelicense Corp., S.A.*, 737 F.2d 263, 268 (2d Cir. 1984) ("USOC"); *see also Fitzgerald v. Thompson*, 353 F. App'x 532, 534 (2d Cir. 2009) (summary order) (citing *id.* for the same), *cert. denied*, 561 U.S. 1038 (2010). Accordingly, courts in this Circuit have found that contract vendees lack standing to assert a takings claim. For example, in *R & V Development, LLC v. Town of Islip*, No. 05 Civ. 5033 (DRH), 2007 WL 14334, at *1 (E.D.N.Y. Jan. 3, 2007), the plaintiff alleged that he was a vendee to a contract for the purchase of a parcel of real property in Islip, New York, and that the town zoning board had denied his application for a variance for single-family housing on the property. The court relied on *USOC* to dismiss the takings claim on the basis of the plaintiff's status as contract vendee rather than property owner at the time of the alleged taking. *Id.* at *2. Similarly in *Gebman v. New York*, No. 07 Civ. 1226 (GLS), 2008 WL 2433693, at *1 (N.D.N.Y. June 12, 2008), the plaintiff alleged various injuries from a corporation's sale of real property to the City of Beacon. There, "ownership [was] not in dispute" because plaintiff, by his own admission, was "a contract vendee holding interest in the development of parcels . . . downstream." *Id.* at *4 (internal quotation marks and citation omitted). The court

observed that while the defendant had not cited any authority for the proposition that only an owner of property may assert a takings claim, that proposition appeared to be a correct statement of law based on the Second Circuit's holding in *USOC*. *Id.* at *5. The court therefore concluded that the plaintiff lacked standing as a contract vendee to assert a takings claim and dismissed the cause of action. *Id.*

Laroe has not provided any reason to depart from the reasoning of *R & V Development* and *Gebman*.[18] First, even if Laroe had equitable title in the property based on the execution of his agreement with Sherman in 2003, such status would have established a legal relationship between Laroe and Sherman, but not between Laroe and Defendants. *See Kendle v. Town of Amsterdam*, 36 A.D.3d 985, 986 (3d Dep't 2007) ("Execution of a land sale contract provides the purchaser with equitable title to the property. It creates privity and duties between the purchaser and seller but not between an equitable title holder and third parties.") (internal citation omitted). Second, Laroe repeatedly acknowledges in his proposed complaint and papers that he was a contract vendee at the time of the alleged taking. *See, e.g.*, Laroe Compl. ¶ 86 (stating that Laroe "became contract vendee of MareBrook and Other Projects in order to create a reasonable residential development."); Laroe Mem. L. 6 ("In New York, a land contract vendor [Sherman] holds legal

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[18] Laroe's attempts to distinguish *R & V Development* and *Gebman* are both superficial and unavailing. *See* Laroe Reply Mem. L. 6, 7 (stating, *inter alia*, that *R&V* "presents a clear example of the maxim 'bad lawyering produces bad law,'" and that the Court is not bound by the rulings of either case).

title, while the land contract vendee [Laroe] holds equitable title."); *id.* at 7 ("[H]olding equitable title gives the land contract vendee full rights of ownership."); Laroe Reply Mem. L. 6 ("[U]nder New York law, a contract vendee is the true owner."). Accordingly, based on the Second Circuit's clear guidance in *USOC*, Laroe does not have standing to bring a takings claim based on its status as contract vendee to the property.[19] Laroe's motion to intervene is therefore DENIED.[20]

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[19] Laroe's reliance on *Johnson v. State*, 10 A.D.3d 596 (2d Dep't 2004), for the argument that it should have standing here because this case presents issues analogous to a condemnation is unavailing. In that case, the Second Department noted that a claimant seeking compensation for condemned property may, in appropriate circumstances, seek recovery by demonstrating an equitable interest therein as opposed to legal title. *Id.* at 597. However, the fact that this is a takings case and not a condemnation proceeding is not merely "a distinction without a difference," *see* Laroe Mem. L. 8, and the Court is persuaded by the above cases denying standing to contract vendees in this context.

Moreover, the various documents Laroe has submitted in support of its motion only confirm that standing is inappropriate here. First, the sale of the property from Sherman to Laroe, as set forth in the original agreement between the parties (the "Agreement"), was expressly conditioned on Sherman's procurement of the approvals and permits from the planning board. *See, e.g.*, Affirmation of Joseph J. Haspel ("Haspel Aff."), Ex. D ("2003 Contract of Sale"), § 4(A); id. at § 19 (stating that closing of title would be conditioned on the authorization of the planning board). Second, the April 25, 2012 arbitration ruling issued by the Rabbinical Court of Mechon L'Hoyroa, which—according to Intervenor-Applicant—"gave Laroe full rights in the Real Property," postdated Sherman's commencement of the instant action. Laroe Mem. L. 6. Accordingly, because only the owner of an interest in a property at the time of the alleged taking has

standing on a takings claim, Laroe's late-filed arbitration ruling cannot save the instant motion. *See* Haspel Aff., Ex. F ("Arbitration Ruling") ("Being that Mr. Steven Sherman failed to pay [Laroe] the amount of $2,500,000, therefore, as of today, the aforementioned properties belong to [Laroe], and [it is] the sole owner[] of the aforementioned properties."). Additionally, in a May 7, 2013 settlement agreement, Laroe and Sherman modified the terms of the Agreement so that closing under the Agreement would occur upon the release of TD Bank's mortgages encumbering the property. See Haspel Aff., Ex. E ("2013 Settlement Agreement"), § 6; Laroe Mem. L. 5 ("Notwithstanding the parties [sic] acknowledgment of full payment by Laroe, in order to protect Laroe, closing would not occur until the foreclosure proceeding was resolved."). Finally, as the Referee Report of Sale makes clear, the TD Bank foreclosure sale occurred on May 21, 2014, when the bank—not Laroe—took ownership of the property. Haspel Aff., Ex. H, § 7.

[20] In addition, even if the instant motion were not futile, it is not clear that it satisfies Rule 24's timeliness requirement. The timeliness of an intervention motion is a matter left to the district court's discretion. *Peterson v. Islamic Republic of Iran*, 290 F.R.D. 54, 57 (S.D.N.Y. 2013). In determining timeliness, the Court may consider, *inter alia*: (a) the length of time the applicant knew or should have known of its interest before making the motion; (b) prejudice to the existing parties resulting from the applicant's delay; (c) prejudice to the applicant if the motion is denied; and (d) the presence of unusual circumstances militating for or against a finding of timeliness. *Id.* (quoting *MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 389 (2d Cir. 2006)). "While the Court may consider . . . 'the point to which the suit has progressed' to determine timeliness, that factor is not dispositive.'" *Id.* (quoting *NAACP v. New York*, 413 U.S. 345, 365-66 (1973)).

Here, Laroe claims that it made the instant application at its "earliest opportunity." Laroe Mem. L. 11. However, its own papers cast doubt on that assertion. According to Laroe, it learned about the case after Defendants initially moved to dismiss. *Id.* But, "[b]ased upon the issues presented in the Motion to Dismiss, Laroe determined to await the outcome of the motion before taking any action." *Id.* Accordingly, by

III. Conclusion

For the reasons stated above, Defendants' motion to dismiss is **GRANTED** in part and **DENIED** in part. Laroe's motion to intervene is **DENIED**. The Clerk of the Court is respectfully requested to terminate the motions, Doc. 21 and Doc. 24. The parties are directed to appear for a status conference on Wednesday, April 23, 2015 at 10:30.

It is SO ORDERED.

Dated: March 31, 2015
New York, NY

/s/
Edgardo Ramos, U.S.D.J.

Laroe's own admission, it filed the instant motion well over one year after it had knowledge of its interest in the case, and almost two and a half years after the commencement of the litigation. However, given the conclusion that the instant motion would be futile, the Court need not decide whether it was timely.

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
DEC 5 - 2016
OFFICE OF THE CLERK

No. 16-605

IN THE

Supreme Court of the United States

TOWN OF CHESTER,

Petitioner,

v.

LAROE ESTATES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether intervenors participating in a lawsuit as of right under Federal Rule of Civil Procedure 24(a) must have Article III standing, or whether Article III is satisfied so long as there is a valid case or controversy between the named parties.

PARTIES TO THE PROCEEDING

The parties to the proceeding below are identified in the caption to the case.

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Laroe Estates, Inc., discloses that it is a privately held corporation that has no parent corporation and no publicly traded stock, and no publicly held company owns more than 10% of its stock.

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INTRODUCTION

More than a decade ago, Steven Sherman attempted to secure approval from Petitioner, the Town of Chester, to subdivide and develop a large piece of property. But whenever Sherman came close to satisfying the Town's requirements, the Town changed the criteria. The costs associated with the Town's constantly shifting requirements forced Sherman to sell his property to Respondent, Laroe Estates, Inc. Sherman also filed this lawsuit alleging that the Town's conduct constituted a regulatory taking. Laroe subsequently moved to intervene based on its interest in the property. Although Sherman's standing to assert the takings claim is undisputed, Petitioner claims that Laroe is not entitled to intervene unless it first establishes that it independently has standing. The Second Circuit properly rejected Petitioner's argument. That judgment does not warrant this Court's review.

First, Petitioner overstates the importance of the question presented. Petitioner's own authorities confirm that an entity's Article III standing or lack thereof is seldom dispositive of its ability to intervene. This Court should not devote its resources to a largely academic question that has little practical significance.

Second, this case is a poor vehicle because it is unclear whether the question presented has any impact on Respondent's ability to intervene. Neither the Second Circuit nor the District Court has determined whether Respondent satisfies Rule 24(a); the District Court is currently considering that question on remand. While Respondent believes that

it fulfills Rule 24(a)'s requirements, the courts below may not agree. And if they conclude that Respondent fails Rule 24(a), the question whether intervenors must also possess standing will be moot. Review of the question presented at this interlocutory stage is therefore premature.

STATEMENT

A. The Town Prevents Sherman From Developing His Land

In 2000, Steven Sherman applied to the Town of Chester for approval to subdivide a nearly 400-acre piece of land he had purchased for $2.7 million ("MareBrook"). *See Sherman v. Town of Chester*, 752 F.3d 554, 557 (2d Cir. 2014). "That application marked the beginning of his journey through the Town's ever-changing labyrinth of red tape." *Id.*

The Town enacted a new zoning ordinance in 2003 that required Sherman to redraft his proposed development plan. *See id.* Just as Sherman completed his new proposal, the Town changed its regulations again—a pattern the Town then repeated multiple times, forcing Sherman to recreate his proposal each time. *See id.* "On top of the shifting sands of zoning regulations, the Town erected even more hurdles," including "announc[ing] a moratorium on development, replac[ing] its officials, and requir[ing] Sherman to resubmit studies that he had already completed." *Id.* Every time Sherman came close to fulfilling the Town's latest requirement, the Town imposed a new one.

B. Running Out Of Funds, Sherman Sells His Property To Laroe

After a decade of attempting to comply with the Town's constantly evolving demands, Sherman had spent more than $5.5 million. *See Sherman*, 752 F.3d at 557. And there was still "no end in sight." *Id.* Along the way, Sherman turned to Laroe, which signed agreements with Sherman regarding MareBrook in 2003 and 2013. Pet. App. 3a-4a. The combined effect of the two agreements was that Laroe purchased MareBrook from Sherman for $2.5 million, subject to a provision requiring Laroe to transfer some lots back to Sherman depending on the number of lots the Town ultimately approved. *See id.*

C. Sherman Sues The Town

Meanwhile, the Town continued to prolong the approval process. In January 2012, Sherman sued the Town, alleging, among other things, that its repeated amendments of its zoning laws wrongfully prevented him from developing MareBrook and constituted a regulatory taking.[1] *See* Pet. App. 21a. The District Court dismissed Sherman's regulatory-takings claim as unripe because the Town had not yet reached a final decision on the development

[1] Sherman initially sued the Town in 2008 in federal court, but "[t]he Town unfairly manipulated the litigation of the case." *Sherman*, 752 F.3d at 560, 568-69. The Town moved to dismiss the case because Sherman had not "alleged that he sought and was denied just compensation by an available state procedure." *Id.* at 563-64. Then, when Sherman voluntarily dismissed his federal case and filed his claims in state court, the Town "removed the case [back to federal court] and ... [again] moved to dismiss on the ground that the takings claim must be heard in state court." *Id.* at 564, 569.

project. *See* Pet. App. 23a. Sherman appealed. He passed away while that appeal was pending, and his widow, Nancy J. Sherman, was substituted in the litigation as his personal representative. *See Sherman*, 752 F.3d at 560.

The Second Circuit reversed the dismissal of the takings claim. *See* Pet. App. 24a. It found that "[s]eeking a final decision [from the Town] would be futile" because "the finish line will always be moved just one step away until Sherman collapses." *Sherman*, 752 F.3d at 563. Moreover, Sherman's allegations about the Town's conduct—"singl[ing] out Sherman's development" and "suffocating him with red tape to make sure he could never succeed in developing MareBrook"—were sufficient to state a takings claim. *Id.* at 565.

D. Laroe Moves To Intervene

1. Twelve days after the Second Circuit remanded the case to the District Court, and before the District Court took up the remand, Laroe notified the District Court of its intention to intervene pursuant to Federal Rule of Civil Procedure 24. Ltr. from J. Haspel, *Sherman v. Town of Chester*, No. 1:12-cv-00647-ER (S.D.N.Y. Mar. 31, 2015), ECF No. 16. Laroe moved to intervene as of right under Rule 24(a)(2) and, in the alternative, by permission under Rule 24(b). *See* Pet. App. 10a.

Laroe argued that it had "an interest relating to the property or transaction" at issue because it was the equitable owner of MareBrook. Fed. R. Civ. P. 24(a)(2); *see* Mot. to Intervene at 8, *Sherman*, No. 1:12-cv-00647-ER, ECF No. 20. Laroe further claimed that its interest would be impaired or

impeded if it were not allowed to intervene, and that Sherman could not adequately represent Laroe's interests. *See* Mot. to Intervene at 13-14. Laroe explained that Sherman is its "adversary" because each contends that the Town has taken its property without just compensation, and "the proceeds from any judgment or settlement may not be sufficient to satisfy" both of their interests. *See id.* at 14. Finally, Laroe argued that its motion was timely. Laroe first learned about Sherman's lawsuit while the Town's motion to dismiss was pending. *See id.* at 11. Laroe attempted to intervene at the first sensible opportunity, within days of when the motion to dismiss was finally resolved. *See id.* Moreover, the case was still in its infancy at that point, as "the parties ha[d] not even begun discovery." Pet. App. 12a. And the Town first answered the complaint last month. *See* Answer, *Sherman*, No. 1:12-cv-00647-ER, ECF No. 64 (Nov. 23, 2016).

2. The District Court denied Laroe's motion to intervene. Pet. App. 57a. The court did not decide whether Laroe satisfied the requirements for intervention under Rule 24. *See* Pet. App. 53a-59a & n.20. Instead, it concluded that Laroe's motion was "futile" because it "does not have standing to bring a takings claim" based on its interest under its purchase agreement with Sherman. Pet. App. 57a.[2]

[2] In the same order, the District Court denied the Town's motion to dismiss Sherman's First Amendment retaliation claim and granted the motion to dismiss Sherman's equal protection, due process, and state law claims. Pet. App. 39a, 46a, 51a, 53a. The District Court denied Sherman's motion for reconsideration on September 30, 2016. *See* Order, *Sherman*, No. 1:12-cv-00647-ER, ECF No. 62.

3. On interlocutory appeal, the Second Circuit vacated the District Court's decision because a party seeking to intervene as of right is not required to "independently have standing." Pet. App. 6a.

"[T]he question of standing in the federal courts is to be considered in the framework of Article III, which restricts judicial powers to cases and controversies." Pet App. 6a. Because "the existence of a case or controversy has been established in the underlying litigation," the Second Circuit explained that "there is no need to impose the standing requirement upon a proposed intervenor." Pet. App. 7a. The court further noted that this Court "has *sub silentio* permitted parties to intervene in cases that satisfy the 'case or controversy' requirement without determining whether those parties independently have standing." Pet. App. 8a (discussing *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010)). And although it acknowledged that some courts have reached a different conclusion, the Second Circuit explained that its longstanding approach "accords with that of the majority ... of sister circuits that have addressed this issue." Pet. App. 7a. For all these reasons, the court held that "[t]he District Court ... erred by denying Laroe's motion to intervene based on its failure to show it had Article III standing." Pet. App. 8a-9a.

For similar reasons, the Second Circuit rejected the Town's argument that affirmance was proper on the alternative ground that Laroe's motion "fails to state a claim against the Town." Pet. App. 9a. "[A]s long as it asserts the same legal theories and seeks the same relief as the existing plaintiff," the court

explained, "a party need not have a stand-alone claim of its own to intervene on the plaintiff's side of a case." *Id.* "That principle applies here" because Laroe "seeks relief that does not differ substantially from that sought by Sherman." Pet. App. 9a-10a.

Because an intervenor need not possess Article III standing, "the District Court should have instead focused its analysis on the requirements of Rule 24." Pet. App. 10a. The Second Circuit concluded that "the factual record before [it] [was] insufficiently developed at this stage to allow [it] to confidently resolve [the parties'] arguments" regarding Rule 24. Pet. App. 11a. It therefore remanded the case to the District Court "to determine in the first instance if Laroe satisfies the requirements of Rule 24." *Id.*

REASONS FOR DENYING THE PETITION

I. THE QUESTION PRESENTED IS NOT SIGNIFICANT ENOUGH TO WARRANT THIS COURT'S REVIEW

Petitioner cites numerous cases that discuss whether intervenors participating in a lawsuit as of right must have Article III standing. Although language in those cases, viewed in isolation, points in different directions, Petitioner's own authorities confirm that these differences seldom actually determine an entity's ability to intervene. This Court should not grant the writ to consider an issue of such limited significance.

A. Some Of Petitioner's Cases Do Not Involve The Question Presented

Petitioner relies on language from several cases that do not present the question Petitioner asks this

Court to review—because there was no valid case or controversy between the named parties, because intervention was not at issue at all, or because a party sought to intervene on a basis other than Rule 24(a).

Some cases did not address the question presented—whether an intervenor must have Article III standing if "*there is a valid case or controversy between the named parties*" (Pet. i) (emphasis added)—because the named parties either settled their dispute before intervention, *see Bond v. Uteras*, 585 F.3d 1061, 1068 (7th Cir. 2009); *Dillard v. Chilton Cty. Comm'n*, 495 F.3d 1324, 1327-28 (11th Cir. 2007) (per curiam), or they chose not to appeal an adverse decision, *see Planned Parenthood of Mid-Mo. & E. Kansas, Inc. v. Ehlmann*, 137 F.3d 573, 576 (8th Cir. 1998); *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991); *see also Perry v. Schwarzenegger*, 630 F.3d 898, 902 (9th Cir. 2011) (per curiam) (intervenors sought to defend constitutionality of statute on appeal where defendant declined to do so). There was thus no continuing case or controversy between the original parties. In that situation, courts agree that an intervenor's right to participate in the suit "is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Diamond v. Charles*, 476 U.S. 54, 68 (1986); *see Holllingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013) (requiring intervenors to establish standing because they were "[t]he only individuals who sought to appeal" adverse order); *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016) (same); *Dillard*, 495 F.3d at 1330; *Bond*, 585 F.3d at 1071; *Planned Parenthood*, 137 F.3d at 576-77; *Yniguez*, 939 F.2d at 731.

The question whether intervenors must possess standing was likewise not presented in *Tarsney v. O'Keefe*, 225 F.3d 929 (8th Cir. 2000), which did not involve intervention at all. *Tarsney* addressed the standing of legislators as *plaintiffs*. *See id.* at 933-34, 939.

Finally, some of the cases that Petitioner cites are inapposite because they involved motions to intervene on the basis of provisions other than Rule 24(a). *See* Mot. to Intervene Out of Time at 1, *Agric. Retailers Ass'n v. U.S. Dep't of Labor*, 837 F.3d 60 (D.C. Cir. 2016) (No. 15-1326), Dkt. No. 20 (intervention under Fed. R. App. Proc. 15); *King v. Governor of New Jersey*, 767 F.3d 216, 246 (3d Cir. 2014) (intervention under Fed. R. Civ. P. 24(b)); *see also City of Chicago v. FEMA*, 660 F.3d 980, 986 (7th Cir. 2011) (declining to decide whether entities "were entitled to intervene as a matter of right" because "they should have been permitted to intervene under [Rule] 24(b)").

B. Even When The Question Presented Is At Issue, It Seldom Affects An Entity's Ability To Intervene

Even when it is fairly presented, the question on which Petitioner seeks certiorari is seldom dispositive of intervention. In some of Petitioner's cases, an entity could not intervene regardless of whether it possessed standing because it could not satisfy Rule 24(a)'s separate criteria. In other cases, it could intervene even if it lacked standing on its own because, as in *McConnell*, it sought the same relief as a party that had standing. Finally, the answer to the question presented is insignificant in many cases

because an entity that satisfies Rule 24(a)'s interest requirement will generally also satisfy Article III.

1. In several cases, intervention would have been denied regardless of Article III standing because the proposed intervenor could not satisfy Rule 24(a). *See San Juan Cty. v. United States*, 503 F.3d 1163, 1207 (10th Cir. 2007) (en banc) (denying intervention based on adequate representation); *Solid Waste Agency v. U.S. Army Corps of Eng'rs* 101 F.3d 503, 508 (7th Cir. 1996) (same); *Bldg. & Constr. Trades Dep't v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994) (same); *United States v. Metro St. Louis Sewer Dist.*, 569 F.3d 829, 838-39 (8th Cir. 2009) (denying intervention based on lack of adequate interest); *Bethune Plaza Inc. v. Lumpkin*, 863 F.2d 525, 531 (7th Cir. 1988) (denying intervention based on adequate representation and lack of impairment of interest); *Keith v. Daley*, 764 F.2d 1265, 1270 (7th Cir. 1985) (denying intervention based on adequate representation); *see also In re Idaho Conservation League*, 811 F.3d 502, 515 (D.C. Cir. 2016) (denying intervention for lack of standing but noting that intervenors also failed "to show the necessary impairment to their interests"); *Deutsche Bank Nat'l Tr. Co. v. FDIC*, 717 F.3d 189, 194 (D.C. Cir. 2013) (intervenors would fail Rule 24(a)(2)'s interest requirement "[e]ven if [they] enjoyed Article III standing"); *S. Christian Leadership Conference v. Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984) (per curiam) (noting that denial of motion to intervene would have been appropriate based on untimeliness). In each of these situations, an entity's standing ultimately had no effect on its ability to intervene.

2. By Petitioner's own account, the question presented was "irrelevant" in other cases because the intervenor and a named party raised the same arguments or sought the same relief. Pet. 25; *see King*, 767 F.3d at 246; *Ruiz v. Estelle*, 161 F.3d 814, 833 (5th Cir. 1998); *Steward v. Abbott*, -- F. Supp. 3d --, No. 5:10-CV-1025-OLG, 2016 WL 4771311, at *2 (W.D. Tex. May 17, 2016). Under those circumstances, a court "need not address the standing of the intervenor[s]." *McConnell*, 540 U.S. at 233.

3. And in still other cases, the question presented did not affect an entity's ability to intervene because an intervenor who satisfies Rule 24(a) typically also satisfies Article III. In fact, because it would be an "unusual case[] where an intervenor could satisfy the interest requirement of Rule 24(a)(2) without having a stake in the controversy needed to satisfy Article III," the First Circuit has "see[n] no reason to concern [itself] with the abstract question whether an intervenor-defendant must show some separate form of standing." *Cotter v. Mass. Ass'n of Minority Law Enf't Officers*, 219 F.3d 31, 34 (1st Cir. 2000).

a. Among the courts that require intervenors to possess standing, several cases recognize that an intervenor's "constitutional standing is alone sufficient to establish that the [intervenor] has 'a[] [Rule 24(a)] interest relating to the property or transaction which is the subject of the action.'" *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (quoting Fed. R. Civ. P. 24(a)(2)); *see United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1146 (D.C. Cir. 2009) (per curiam) ("[B]y demonstrating Article III standing, the intervenors

adduce a sufficient interest [under Rule 24(a)(2)]."); *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1024-25 (8th Cir. 2003) (interest sufficient to satisfy Article III and Rule 24(a)(2)); *Forest Cty. Potawatomi Cmty. v. United States*, 317 F.R.D. 6, 13 (D.D.C. 2016) ("[F]or the same reasons as to why the Menominee have standing to intervene, the Court finds that the Menominee have a 'legally protected' interest in this action."). *But see City of Chicago*, 660 F.3d at 984-86 (intervenors' interest likely satisfied both Article III and Rule 24(a), but Article III standing is not always sufficient to satisfy Rule 24(a)'s interest requirement).

b. Even in courts that do not require intervenors to establish standing, most cases that allowed intervention did so based on a Rule 24(a) interest that likely would satisfy Article III as well.

For example, in *Stone v. First Union Corp.*, 371 F.3d 1305 (11th Cir. 2004), a former employee sued a bank for age discrimination. The court allowed other former employees who also alleged age discrimination to intervene. *See id.* at 1307, 1309. In *Jansen v. City of Cincinnati*, 904 F.2d 336 (6th Cir. 1990), white applicants who had not been hired by a fire department challenged a consent decree that established an affirmative action program governing the fire department's hiring and promotion decisions. *See id.* at 338. Black firefighters whose jobs and future promotions were at stake were entitled to intervene to defend their "interest in continuing affirmative action under the consent decree." *See id.* at 342. And the farmers' organization that intervened in *Sierra Club v. Glickman*, 82 F.3d 106 (5th Cir. 1996) (per curiam), likewise had a concrete

and particularized interest in the disposition of that case. The Sierra Club's lawsuit against the U.S. Department of Agriculture (USDA) "ha[d] a direct impact upon" the farmers' conduct and "threaten[ed] their contracts with the USDA." *Id.* at 109. In each of these cases, the interests that courts found sufficient for intervention under Rule 24(a) would likely also satisfy Article III, if intervenors were required to show standing.

The Rule 24(a) interests at stake in other cases that Petitioner cites are similarly relevant to Article III. *See Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1251 (10th Cir. 2001) (permitting organizations to intervene to defend monument based on "their financial stake in the tourism the monument has created"); *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997) (intervenor had Rule 24(a) interest because, among other things, it was "regulated by at least three of the four statutory provisions challenged by plaintiffs"); *Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991) (non-marital children could intervene in wrongful-death action brought by their father's estate).

Petitioner suggests that these cases allowed intervention solely because of the potential for adverse stare decisis effects in the future. *See* Pet. 15-17. That is wrong. Whatever stray language those decisions may contain regarding the role of stare decisis, each intervenor had a concrete interest that faced actual or imminent impairment. Those entities likely would have been able to satisfy Article III if they had been required to do so.

II. THIS CASE IS A POOR VEHICLE FOR RESOLVING THE QUESTION PRESENTED

In any event, this case is a poor vehicle because there are serious doubts whether the question presented will ultimately affect Respondent's ability to intervene.

This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., regarding denial of certiorari); *see also* Stephen M. Shapiro, et al., SUPREME COURT PRACTICE § 4.18 (10th ed. 2013). Here, no court has finally determined whether Respondent is entitled to intervene. Both the District Court and the Second Circuit based their opinions on Article III standing, without deciding whether Respondent separately satisfied Rule 24. *See* Pet. App. 13a, 17a, 18a, 59a n.20. And the Second Circuit remanded the case for the District Court to make that determination in the first instance. Pet. App. 11a. To be sure, Respondent believes that it meets each of Rule 24(a)'s criteria. But if the lower courts disagree, resolving the question presented would have no effect on the outcome of this case. This Court's review is therefore premature.

The interlocutory posture of this case renders it a poor vehicle for another reason: Although the question presented focuses only on Rule 24(a) (*see* Pet. i), Respondent moved to intervene under both Rule 24(a) and Rule 24(b). *See* Pet. App. 10a, 53a. It is not unusual for courts to bypass Rule 24(a) and conclude that permissive intervention is warranted under Rule 24(b). *See, e.g.*, *City of Chicago*, 660 F.3d

at 986. And the District Court may do just that on remand. Indeed, the District Court initially denied Respondent's motion in its entirety for lack of standing, *see* Pet. App. 57a, and the Second Circuit remanded for "the District Court to determine in the first instance if Laroe satisfies the requirements of *Rule 24*," Pet. App. 11a (emphasis added).

The question presented is also unlikely to be outcome-determinative because, even if Respondent were required to demonstrate standing, it could easily do so. There is no question that the owner of property has standing to challenge its unconstitutional taking. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012-13 (1992). And Respondent has an equitable ownership in the property based on its purchase agreement with Sherman. New York law has long recognized that "[t]he execution of a contract for the purchase of real estate and the making of a partial payment gives the contract vendee equitable title to the property." *Carnavalla v. Ferraro*, 281 A.D.2d 443, 443 (N.Y. App. Div. 2001); *see New York Cent. & Hudson River R.R. Co. v. Cottle*, 187 A.D. 131, 144 (N.Y. App. Div. 1919), *aff'd* 129 N.E. 896 (N.Y. 1920); *Bean v. Walker*, 95 A.D.2d 70, 72 (N.Y. App. Div. 1983). Moreover, an equitable owner enjoys the full rights of ownership. *See In re Site for Jefferson Houses*, 117 N.E.2d 896, 898 (N.Y. 1954); *Williams v. Haddock*, 39 N.E. 825, 826 (N.Y. 1895); *Bean*, 95 A.D.2d at 72.

These vehicle problems are just as "severe" as those in past petitions raising the question presented. Pet. 25; *cf.* U.S. Br. in Opp. at 6, *Elko Cty. v. Wilderness Soc'y*, 556 U.S. 1147 (2009) (No. 08-571), 2009 WL 390030 (intervenor satisfied both Article III

and Rule 24(a)); Br. in Opp. at 5, *Standing Together to Oppose Partial-Birth-Abortion v. Northland Family Planning Clinic, Inc.*, 552 U.S. 1096 (2008) (No. 07-291), 2007 WL 3322288 (entity failed to satisfy Rule 24(a)). This Court denied certiorari in those cases, and it should do the same here.

III. THE DECISION BELOW IS CORRECT

This Court's review is also unwarranted because the Second Circuit's conclusion—which accords with the majority of the circuits that have considered it—is correct.

1. Article III limits the "judicial power" of federal courts to the resolution of "cases" and "controversies." U.S. Const. art. III, § 2. "The doctrine of standing gives meaning to these constitutional limits by identifying those disputes which are appropriately resolved through the judicial process." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014); *see also, e.g.*, *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013) ("One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue."). Requiring a plaintiff to establish that he has standing—i.e., that he "suffered an injury in fact," "that is fairly traceable to the challenged conduct of the defendant," and "that is likely to be redressed by a favorable judicial decision"—"confines the federal courts to a properly judicial role." *Spokeo v. Robins*, 136 S. Ct. 1540, 1547 (2016); *see also, e.g.*, *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471-75 (1982).

Importantly, "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006); *see Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007) ("Only one of the petitioners needs to have standing to permit us to consider the petition for review."). Thus, upon finding that at least one party "has demonstrated standing" with respect to a particular claim, this Court generally does not consider whether other parties would also have standing to assert the same claim. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977); *see, e.g., Horne v. Flores*, 557 U.S. 433, 446 (2009); *Massachusetts*, 549 U.S. at 518; *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 826 n.1, (2002); *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 719 (1990); *Clinton v. City of N.Y.*, 524 U.S. 417, 431 n.19 (1998); *Bowen v. Kendrick*, 487 U.S. 589, 620 n.15 (1988); *Pennell v. City of San Jose*, 485 U.S. 1, 8 n.4 (1988); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981). That is because the presence of just one plaintiff with standing "assures that an admittedly justiciable controversy is ... before the Court." *Dir., Office of Workers' Comp. Programs v. Perini N. River Assocs.*, 459 U.S. 297, 305 (1983).[3]

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[3] Petitioner's reliance on general language describing the standing doctrine is misplaced because none of the cases Petitioner cites requires multiple *parties* to establish standing with respect to a single claim. *See* Pet. 19-20. And *Lewis v. Casey*, 518 U.S. 343 (1996), recognizes only that at least one party must establish standing with respect to each *claim*. *Id.*

The participation of intervenors who cannot "independently ... satisfy Article III" no more "destroy[s] jurisdiction already established" than the presence of additional plaintiffs. *Ruiz*, 161 F.3d at 832. That is, "[i]f the plaintiff that initiated the lawsuit has Article III standing, a 'case' or 'controversy' exists regardless of whether a subsequent intervenor has such standing." *King*, 767 F.3d at 245. This Court recognized as much in *McConnell*, when it declined to consider whether an intervenor had standing because the intervenor's "position ... [was] identical" to that asserted by a party with standing. 540 U.S. at 233. *Cf. Arizonans for Official English v. Arizona*, 520 U.S. 43, 66-67 (1997) (declining to address intervenors' standing without first "inquir[ing] ... whether [the] originating plaintiff ... still has a case to pursue"). And even courts that adopt Petitioner's contrary view recognize "the tension between requiring standing of prospective plaintiff intervenors while at the same time finding Article III satisfied when only one party has standing." *Jones v. Prince George's Cty.*, 348 F.3d 1014, 1018 (D.C. Cir. 2003).

2. Here, there is no dispute that Sherman has standing to pursue the takings claim. And given that Respondent "asserts the same legal theories and seeks the same relief as [Sherman]," Pet. App. 9a, Sherman's standing is sufficient to "assure[]" there is

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(continued...)

at 358 n.6 ("[T]he right to complain of *one* administrative deficiency [does not] automatically confer[] the right to complain of *all* administrative deficiencies[.]").

"an admittedly justiciable controversy," *Perini*, 459 U.S. at 305. *See also McConnell*, 540 U.S. at 233; Reply Br. at 12, *Laroe Estates Inc. v. Town of Chester*, 828 F.3d 60 (2d Cir. 2016) (No. 15-1086-cv), ECF No. 60-1 ("Laroe does not suggest that the Town's exposure to Laroe is independent from its exposure to Sherman. Laroe recognizes that there is one tract of land and one taking.").

Petitioner incorrectly argues that Respondent's proposed intervention has "prolonged" or altered the course of this litigation. Pet. 21. The longevity of this case is attributable to Sherman's vigorous defense against Petitioner's multiple efforts to dismiss his claims. After the District Court initially dismissed Sherman's takings claim on ripeness grounds, Sherman successfully appealed to the Second Circuit. *See Sherman*, 752 F.3d at 557. And when Petitioner moved to dismiss Sherman's remaining claims on remand, Sherman again resisted. *See* Mem. in Opp. to Mot. to Dismiss, *Sherman*, No. 1:12-cv-00647-ER, ECF No. 33. Sherman continues to pursue this case in the District Court today, even though the takings claim is one of only two remaining claims.[4] *See* Pet. App. 24a, 37a-39a.

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[4] Whether Sherman has fewer resources than Respondent to devote to this litigation has no bearing on Sherman's standing to pursue the takings claim. *See* Pet. 20-21; *see also* Pet. 13a. Nor does Sherman's apparent attempt to extract an incentive payment from Respondent, *see* Ltr. from J. Haspel at 2, *Sherman*, No. 1:12-cv-00647-ER, ECF No. 16, mean that Sherman has abandoned the takings claim. *See* Pet. 20-21.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 16-605

IN THE
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TOWN OF CHESTER,
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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

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IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

INTRODUCTION

This case presents the first clean vehicle in over 30 years to resolve a foundational question of civil procedure: whether intervenors as of right must possess Article III standing. This Court has twice identified the question as an unresolved one. *McConnell* v. *FEC*, 540 U.S. 93, 233 (2003) (citing *Diamond* v. *Charles*, 476 U.S. 54, 68-69 n.21 (1986)), *overruled on other grounds by Citizens United* v. *FEC*, 558 U.S. 310 (2010). And the federal courts of appeals are deeply divided over the question, three to seven. Yet this Court has never before been presented with the right case in which to resolve it.

Laroe disputes none of that. Instead, it argues that the issue of intervenors' Article III standing is inconsequential or, alternatively, that the Court should wait for a vehicle that satisfies an impossible and contradictory set of criteria. These objections fail to withstand even modest scrutiny, and they offer no reason for the Court to further delay consideration of this important question—a matter of "federal jurisdiction" and "the proper functioning of the federal judiciary" that this Court has "the prime responsibility" to resolve. Stephen M. Shapiro et al., *Supreme Court Practice* 275 (10th ed. 2013); *see id.* at 275-276 (listing "many [granted] cases falling within this category"). It should grant review to resolve the intractable circuit split once and for all.

ARGUMENT

I. THE QUESTION PRESENTED HAS DEEPLY DIVIDED THE CIRCUITS AND IS OF SUBSTANTIAL IMPORTANCE

1. Laroe does not contest that the courts of appeals are split on the question presented. Nor could it: circuits have time and again acknowledged their divide, which has (as of July) widened to three-to-seven. *See* Pet. App. 7a-8a; *King* v. *Governor of New Jersey*, 767 F.3d 216, 245 (3d Cir. 2014). That is why Laroe must concede that although the Second Circuit joined the "majority of the circuits" in its decision below, Br. in Opp. 16, "some courts have reached a different conclusion," *id.* at 6, and "adopt[ed] Petitioner's contrary view," *id.* at 18.

2. Laroe nonetheless attempts to minimize the import of the split by claiming that it is seldom

dispositive. *Id.* at 9-13. That is demonstrably incorrect.

Case after case in circuits that do not require intervenor standing has permitted intervention where Article III standing was plainly absent. The Ninth Circuit, for example, applies "a virtual *per se* rule that the sponsors of a ballot initiative have a sufficient interest *** to intervene pursuant to Fed. R. Civ. P. 24(a)," *Yniguez* v. *Arizona*, 939 F.2d 727, 733 (9th Cir. 1991), even though initiative proponents are not "Article-III-qualified defenders of the measures they advocated," *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 65 (1997). The Fifth, Sixth, Tenth, and Eleventh Circuits hold that the mere "possibility of adverse stare decisis effects provides intervenors with sufficient interest to join an action," *Jansen* v. *City of Cincinnati*, 904 F.2d 336, 342 (6th Cir. 1990); *see Stone* v. *First Union Corp.*, 371 F.3d 1305, 1310 (11th Cir. 2004); *Coal. of Ariz./N.M. Ctys. for Stable Economic Growth* v. *Dep't of Interior*, 100 F.3d 837, 844 (10th Cir. 1996); *Sierra Club* v. *Glickman*, 82 F.3d 106, 109-110 (5th Cir. 1996) (per curiam)*—notwithstanding that "concern about the precedential effect of an adverse decision is not sufficient to confer standing," *City of Cleveland* v. *NRC*, 17 F.3d 1515, 1515-1516 (D.C. Cir. 1994) (per curiam). And the Fifth Circuit has held that legisla-

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* Laroe describes these courts' statements about "adverse stare decisis effects" as "stray language." Br. in Opp. 13. Not so. In each case, the courts identified those effects as the "impairments" that justified Rule 24(a) intervention. *See Jansen*, 904 F.2d at 342; *Stone*, 371 F.3d at 1310; *Coalition*, 100 F.3d at 844; *Glickman*, 82 F.3d at 110.

tors could intervene in a suit even where "[i]t [wa]s doubtful" that they would "have sufficient standing" to satisfy Article III—indeed, where the court "assume[d] * * * that [they] would not." *Ruiz* v. *Estelle*, 161 F.3d 814, 829-830 (5th Cir. 1998).

Courts on the short side of the split, by contrast, prohibit intervention in all of these circumstances. The Seventh Circuit holds that an organization's "interest as chief lobbyist * * * in favor of [a law]" does not confer standing to intervene. *Keith* v. *Daley*, 764 F.2d 1265, 1269 (7th Cir. 1985) (denying intervention on this basis); *see United States* v. *36.96 Acres of Land*, 754 F.2d 855, 857 (7th Cir. 1985) (similar). The D.C. Circuit says that Article III bars intervention based merely on "the possible precedential impact" of a decision. *Rio Grande Pipeline Co.* v. *FERC*, 178 F.3d 533, 537 (D.C. Cir. 1999); *see Bethune Plaza, Inc.* v. *Lumpkin*, 863 F.2d 525, 530-531 (7th Cir. 1988) (similar). And the Eighth and D.C. Circuits broadly deny legislators leave to intervene because they lack standing. *See, e.g.*, *Planned Parenthood of Mid-Mo. & E. Kan., Inc.* v. *Ehlmann*, 137 F.3d 573, 577 (8th Cir. 1998); *S. Christian Leadership Conference* v. *Kelley*, 747 F.2d 777, 778 (D.C. Cir. 1984) (per curiam).

Indeed, the Court's own docket confirms that requiring intervenors to establish standing matters. In two cases in recent years, the Court has ordered appeals dismissed because entities granted Rule 24 intervention in the courts below could not satisfy standing requirements. *See Wittman* v. *Personhuballah*, 136 S. Ct. 1732, 1736 (2016); *Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2660, 2668 (2013). (In a third case, the Court closely divided on that question.

See United States v. *Windsor*, 133 S. Ct. 2675, 2688 (2013); *id.* at 2703-2705 (Scalia, J., dissenting); *id.* at 2713 (Alito, J., dissenting).) If standing were a prerequisite for intervention in every circuit, neither appeal would have existed.

3. Having failed to establish that the question presented lacks consequence, Laroe tries flyspecking individual cases in the ten-circuit split in an effort to show that not all of those circuits have confronted the question presented. These arguments are unavailing.

Laroe complains (at 8) that a handful of cases discussing the split did not involve a live dispute between the named parties. But those cases make clear whether the circuit would require standing in a live dispute. *See Bond* v. *Utreras*, 585 F.3d 1061, 1069-1070 (7th Cir. 2009); *Dillard* v. *Chilton Cty. Comm'n*, 495 F.3d 1324, 1337 (11th Cir. 2007) (per curiam); *Yniguez*, 939 F.2d at 731; *Planned Parenthood of Mid-Mo.*, 137 F.3d at 577. And each of these circuits has repeatedly applied its rule where the named parties did have an ongoing controversy. *Compare, e.g.*, *City of Chi.* v. *FEMA*, 660 F.3d 980, 984-985 (7th Cir. 2011) (requiring standing), *and Mausolf* v. *Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996) (same), *with Vivid Entm't, LLC* v. *Fielding*, 774 F.3d 566, 573 (9th Cir. 2014) (no standing necessary), *Wilderness Soc'y* v. *USFS*, 630 F.3d 1173, 1179 (9th Cir. 2011) (same), *and Chiles* v. *Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989) (same).

Laroe also says (at 9) that three cases discussing the split did not involve motions to intervene under Rule 24(a). But that is of no moment. In *King*, the Third Circuit surveyed the circuit split and, without

limitation, adopted "[t]he majority's view" that "an intervenor is not required to possess Article III standing to participate." 767 F.3d at 245. In the other two cases that Laroe cherry picks, the courts of appeals simply restated their longstanding rules on intervention, which they had previously applied in the Rule 24(a) context. *Compare Agric. Retailers Ass'n* v. *U.S. Dep't of Labor*, 837 F.3d 60, 66 (D.C. Cir. 2016), *and Tarsney* v. *O'Keefe*, 225 F.3d 929, 939 (8th Cir. 2000), *with Kelley*, 747 F.2d at 778, *and Planned Parenthood of Mid-Mo.*, 137 F.3d at 576, 578. (Laroe also cites *City of Chicago*, but there the proposed intervenor sought leave to intervene under both Rule 24(a) and (b). *See* 660 F.3d at 982.)

4. Laroe offers three more scattershot arguments why the split does not merit this Court's review. All fail.

First, Laroe points (at 10) to a few cases in which a court denied standing but suggested that Rule 24(a) might also bar intervention as proof the split does not matter. Laroe is wrong both legally and factually. Legally, it matters a great deal whether a court denies intervention under Article III or Rule 24(a): deeming a limit jurisdictional rather than procedural has important doctrinal and practical consequences. *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824-825 (2013). Factually, Laroe's argument reflects another instance of cherry-picking; many more cases have held that intervenors lack Article III standing without even hinting that Rule 24(a) would also bar intervention. *See, e.g.*, *United States* v. *Geranis*, 808 F.3d 723, 729 (8th Cir. 2015); *Defs. of Wildlife* v. *Perciasepe*, 714 F.3d 1317, 1327 (D.C. Cir. 2013);

People Who Care v. *Rockford Bd. of Educ.*, 171 F.3d 1083, 1089-1090 (7th Cir. 1999).

Second, Laroe argues (at 11) that courts have found standing to be "irrelevant" where "the intervenor and a named party raised the same arguments or sought the same relief." Laroe misstates those courts' holdings. When a court is determining whether it has jurisdiction to *decide an issue*, it is irrelevant whether every party that raises that issue has standing. *See McConnell*, 540 U.S. at 233. When a court is deciding whether *a party may participate in a case*, however, the court must assure itself of each party's standing. That rule is well-established for plaintiffs. *See, e.g.*, *Hochendoner* v. *Genzyme Corp.*, 823 F.3d 724, 733 (1st Cir. 2016). The crux of the dispute among the courts of appeals is whether that same requirement applies to intervenors. Laroe cannot wave the circuit split away simply by calling the core question it presents "irrelevant."

Third, Laroe asserts (at 11) that "an intervenor who satisfies Rule 24(a) typically also satisfies Article III." Laroe's premier evidence for this broad claim consists of cases in which courts have opined that Article III standing can suffice to establish an element of Rule 24(a). Br. in Opp. 11-12. But Laroe's argument and its proof do not line up. The fact that Article III standing may suffice to establish a Rule 24(a) interest does not mean the inverse is true—that a Rule 24(a) interest suffices to establish Article III standing. Indeed, courts have made clear that it does not. *See, e.g.*, *Utah Ass'n of Ctys.* v. *Clinton*, 255 F.3d 1246, 1252 n.4 (10th Cir. 2001) ("Article III standing requirements are more stringent than those for intervention under Rule 24(a)").

In sum, Laroe presents nothing to show this split is not real, recurring, and consequential. The Court should grant certiorari and resolve it.

II. THE DECISION BELOW IS WRONG

As the petition explained (at 19-21), review is also warranted because the decision below is inconsistent with Court precedent and contrary to common sense. Intervenors invoke the power of the federal courts separately from the original parties; therefore, they should have to satisfy the same Article III standing requirements as the original parties. *See Hollingsworth*, 133 S. Ct. at 2661; *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475-476 (1982).

Laroe argues (at 17) that this Court has held otherwise, but it once again confuses a court's jurisdiction to decide an issue with its jurisdiction to grant intervention. The cases it cites explained that appellate courts have jurisdiction to resolve a disputed merits question so long as at least one party on each side of the dispute has standing. *See, e.g.*, *Horne* v. *Flores*, 557 U.S. 433, 446-447 (2009) (finding jurisdiction to reach a disputed merits question because one petitioner had standing); *Rumsfeld* v. *Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) (finding jurisdiction to determine a statute's constitutionality because one plaintiff had standing, but also "limit[ing] [the opinion's] discussion" to that plaintiff). This line of cases has nothing to do with the question presented by this case, which concerns courts' jurisdiction over particular *entities*.

On that subject, this Court has long held that "the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether

the particular plaintiff is entitled to an adjudication of the particular claims asserted." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006) (brackets and emphasis omitted) (quoting *Allen* v. *Wright*, 468 U.S. 737, 752 (1984)). Accordingly, defendants often levy—and courts often resolve—challenges to individual claimants' standing. *See, e.g.*, *Gladstone Realtors* v. *Vill. of Bellwood*, 441 U.S. 91, 112 n.25, 115-116 (1979) (concluding that certain plaintiffs had standing to assert claims and others did not); *Cal. Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 66-70 (1974) (rejecting constitutional challenge by banking plaintiffs on the merits, but declining to consider merits of a "similar challenge by the depositor plaintiffs" because "the depositor plaintiffs lack standing"); *Hochendoner*, 823 F.3d at 733 ("the plaintiff-by-plaintiff and claim-by-claim analysis required by standing doctrine demands allegations linking each plaintiff to each of these injuries"); *Fontenot* v. *McCraw*, 777 F.3d 741, 746 (5th Cir. 2015) ("The court must evaluate each plaintiff's Article III standing for each claim; 'standing is not dispensed in gross.'" (quoting *Lewis* v. *Casey*, 518 U.S. 343, 358 n.6 (1996))).

The same rule should apply to intervenors, who do not simply join existing party filings, but instead file their own separate pleadings. *See* Fed. R. Civ. P. 24(c); *cf. Bullcreek* v. *NRC*, 359 F.3d 536, 540 (D.C. Cir. 2004) (finding it "undisputed that [one petitioner] has standing," and "inasmuch as the petitioners have filed a joint brief, the court need not decide whether the other petitioners have standing" (citation omitted)). Once intervention is granted, intervenors have the privileges of original parties, can develop distinct litigation strategies, and can make

their own discovery demands. 7C Charles Alan Wright et al., *Federal Practice and Procedure* §§ 1920-1921 (3d ed. Apr. 2016 update); *see* Pet. App. 18a (explaining that Laroe and Sherman "disagree about litigation strategy and on the issue of damages"); Br. in Opp. 5 (claiming that "Sherman is [Laroe's] 'adversary' "). It is only logical that they should also share the burdens of the original parties—including the need to satisfy Article III standing requirements. Pet. 19; Int'l Municipal Lawyers Ass'n Amicus Br. 2-14. The court of appeals' contrary ruling was erroneous, and inconsistent with this Court's precedent.

III. THIS CASE PROVIDES THE IDEAL VEHICLE TO RESOLVE THE SPLIT

Laroe does not dispute that the Court has never before been presented with a clean vehicle to resolve the question presented. *See* Pet. 24-26. This case finally offers it one: The question proposed for review was pressed below, squarely answered by the lower courts, and is fairly presented by the petition—none of which Laroe contests.

Laroe instead argues (at 14-15) that this case, too, is a poor vehicle because the lower courts did not *also* resolve Laroe's entitlement to intervene under Rule 24. To the contrary; this case is a clean vehicle to decide the issue *because* "[b]oth the District Court and the Second Circuit based their opinions on Article III standing" exclusively. Br. in Opp. 14; *see* Pet. App. 1a-2a, 57a. Rule 24 brings into play other considerations and factual matters that do nothing to illuminate the purely legal Article III question presented.

Indeed, delaying the case so the district court could consider the Rule 24 question would likely block this Court's capacity to hear it. If the district court granted intervention under Rule 24, the Town could not appeal the order until the case proceeded through discovery, dispositive motions, and potentially a trial—and reached final judgment. *See Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370, 378 (1987) (no immediate appeal as of right from order granting intervention). At that point, most of the costs imposed by Laroe's involvement in the case would be irreversible, and there would be scant benefit to obtaining reversal of the intervention motion. Laroe's suggestion that the Court delay review is therefore for all practical purposes a bid to deny it.

Laroe separately argues (at 15) that resolution of the question presented is unlikely to be outcome determinative in this case because, even if Article III standing is required, Laroe "easily" could demonstrate it. Of course, the district court held to the contrary, based on a straightforward application of circuit law. Pet. App. 55a-57a (citing *U.S. Olympic Comm.* v. *Intelicense Corp., S.A.*, 737 F.2d 263 (2d Cir. 1984)). And this issue, too, is irrelevant to the Court's capacity to resolve the question presented. Laroe simply identifies a case-specific Article III standing issue for a potential remand, not a reason to deny review.

Moreover, it is critical to recognize that *no* case could satisfy both of Laroe's vehicle-related objections. Circuits that require Article III standing cannot reach the Rule 24 question once they conclude that standing is lacking. *See Steel Co.* v. *Citizens for*

a Better Env't, 523 U.S. 83, 93-102 (1998); *see also, e.g.*, *Deutsche Bank Nat'l Tr. Co.* v. *FDIC*, 717 F.3d 189, 194 n.4 (D.C. Cir. 2013) ("it would be improper to decide the Rule 24 issue" before "Article III standing, [which] is a threshold, jurisdiction concept"). And circuits that do not require Article III standing have no reason to reach the standing question at all. Accordingly, the Court will likely never encounter a case in which the court below resolved both the Rule 24 question and the Article III question. Accepting Laroe's rationale for denying review would render the question presented "effectively unreviewable." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 672 (2009) (explaining collateral-order doctrine). Laroe's arguments should be rejected, and the circuit conflict resolved through this case.

CONCLUSION

The petition should be granted.

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No. 16-605

IN THE
Supreme Court of the United States

TOWN OF CHESTER, NEW YORK

Petitioner,

v.

LAROE ESTATES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICUS CURIAE*[1]

Amicus is the International Municipal Lawyers Association, a non-profit, nonpartisan professional organization dedicated to advancing the interests and education of local government lawyers. IMLA's membership consist of more than 2,500 cities, counties, state municipal leagues and individual attorneys representing governmental interests. *Amicus* has no personal stake in the outcome of this case, but has an interest in seeing that litigation involving municipalities is economically efficient and does not unnecessarily burden local governments' limited resources.

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae affirms that no counsel for party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief and no person other than amicus curiae or its counsel made a monetary contribution to its preparation or submission.

Pursuant to Supreme Court Rule 37.2, the Respondents and the Petitioners received at least 10-days' notice of the intent to file this brief under the Rule, each party has consented to the filing of this brief, and copies of the consents are on file with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Second Circuit's ruling allowing Laroe Estates, Inc. to intervene under Rule 24 without first showing Article III standing sets a dangerous precedent that allows parties without a direct stake in the outcome of a case to prolong and complicate litigation, resulting in increased costs to the federal court system, and thus ultimately to taxpayers. The consequences are even more serious in cases involving municipalities, as the cost of intervention also comes at the expense of taxpayers, forcing cash-strapped municipalities to spend scarce resources on defending frivolous litigation in lieu of providing that funding for necessary government services like schools, roads, police and fire services, etc. *Amicus* urges the Court to grant certiorari in order to reverse the Second Circuit's decision.

ARGUMENT

I. Allowing Parties to Intervene Without Article III Standing Increases Costs of Litigation Overall

A. The Costs of Inefficient Litigation Ultimately Trickle Down to Taxpayers.

The court system has become increasingly expensive, with the burden placed on taxpayers. Denise Cardman, *Federal Court Funding* (2016), http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_judiciary/federal-court-funding.html. Taxpayer

dollars fund the majority of the federal judicial system. *Id.* These costs are significant. Congress appropriated $6.78 billion in discretionary funding for the federal Judiciary for the 2016 year, with the majority going to the operating costs of the courts. United States Courts, *FY 2016 Funding Meets Judiciary Needs*, (December 15, 2015) http://www.uscourts.gov/news/2015/12/21/fy-2016-funding-meets-judiciary-needs.

An increase in the length or complexity of litigation will require additional court resources, a cost that ultimately falls to taxpayers. *Id.* As an initial matter, then, any policy that allows additional parties to intervene and insert frivolous claims or to prolong or complicate litigation will increase costs for taxpayers, even when governing bodies are not a party to suit.

As the Fourth Circuit has explained, "[w]hen the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented." *Virginia v. Westinghouse Elec. Corp.*, 542 F. 2d 214, 216 (1976). At best, then, an intervenor who would not have standing to bring suit themselves is merely redundant, and not without a cost, as the "resultant complexity of the litigation, combined with increases in cost and judicial time, would hinder resolution of the present conflict." *Id.* at 217. Worse, the claim is not sufficient to support a separate suit, and would not have been brought in the absence of the original litigation. The chances that allowing an intervenor

will impose additional costs on the judicial system as a whole are therefore significant.

B. Allowing parties to intervene without Article III standing removes a check against frivolous claims

Under the American Rule, a petitioner must bear all costs associated with bringing a suit. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682–84 (1983). This system forces litigants to make economically efficient decisions, such that a "rational plaintiff will bring suit if and only if the expected judgment would be at least as large as his expected legal costs, i.e. the total legal costs discounted by his probability of losing at trial." *New Jersey. v. EPA*, 663 F.3d 1279, 1288 (D.C. Cir. 2011) (Brown, J., dissenting); *see also* Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 58 (1982). This calculus, however, applies primarily to the original plaintiffs to a suit. In contrast, "intervenors bear far fewer costs, and thus shoulder far less risk, than petitioners," meaning that "a party with a marginal claim would be substantially more likely to intervene than it would be to file suit in its own right." *New Jersey*, 663 F.3d at 1288.

If intervenors are not forced to internalize the full costs of bringing suit, it encourages them "to pile on claims that are not sufficiently meritorious to justify filing in their own right." *See* Richard L. Revesz and Michael A. Livermore, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the*

Environment and Our Health 12 (2008) ("[W]e need a mechanism that tells us when to stop spending money. Cost-benefit analysis is that mechanism."). This creates an incentive structure at odds with the original parties to suit, as will be discussed below, and further, a threat to economic efficiency. Absent a pressing economic cost-benefit analysis at the onset of litigation that limits petitioners from initiating marginal claims, judges have had to turn to other methods to curtail excessive intervention.

Judges have found standing as a useful safeguard in managing the "litigation explosion" caused by the 1966 amendments to the Rules of Civil Procedure, which relaxed party joinder requirements. Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415, 439 (1991). It is also a particularly useful tool against potential public-interest intervenors, who often bring actions against government entities and municipalities. These intervenors are likely to lack Article III standing because their interests are "relatively intangible, abstract, [and] ideological," as compared to the concrete interests of the petitioner who initiated the suit. *Id.* at 419; *see, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

Hawaii provides a good example of what can happen if standing requirements are relaxed. In recent years, Hawaii's state courts have demonstrated a "willingness to depart from the federal approach and broaden standing," particularly for cases involving public-policy questions. Kevin Hallstrom, *Standing Down: The Negative Consequences of Expanding Hawaii's Doctrine of*

Standing, 30 U. HAW. L. REV. 475, 475 (2007). This development undermines the original goal of standing requirements in promoting judicial restraint, and "open[s] up the metaphorical floodgates" for frivolous lawsuits that negatively impact the economy. *Id.* at 493. The Article cautions that "lowering the barriers to justice provides greater opportunity for judicial activism," forcing the court to deal with "hundreds of issues previously left only to the legislature." *Id.* at 492 ("If the [plaintiffs] can point to the perceived harm of sea animals or the disruption of surfing spots to establish standing, any group should be able to assert a specific interest in some environmental or aesthetic harm caused by another party").

This concern is compounded for situations involving intervenors, who face even less costs in attaching their claims to existing litigation, forcing courts to adjudicate and parties to litigate issues that could not support a suit in their own right. The additional costs of allowing intervenors in these cases, then, falls heavily on governing bodies and their taxpayers. As one Ninth Circuit Judge noted:

> [T]he district court must retain flexibility when ruling on intervention applications. This is particularly true in complex public interest litigation which typically involves multiple parties and issues and often attracts multiple applications for intervention. If the trial is not to become unmanageable, the district court must have some discretion to limit the issues on which or the stages during which a party may intervene.

See Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 531 (9th Cir. 1983) (Wallace, J., dissenting).

C. Allowing parties to intervene without Article III standing prolongs and complicates litigation at the expense of the original litigants

Litigation can be a lengthy process and potential plaintiffs must acknowledge from the onset that there may be a long period between bringing a claim and ultimate resolution and relief. While litigants await court decisions, attorneys' fees accrue and the opportunity for relief and resolution is delayed.[2] Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 673 (1973) (noting the opportunity costs of litigation provide the court system with a functional "initial screening barrier"). As discussed above, intervening parties do not face these same obstacles as plaintiffs and defendants, since they become attached to a legitimate case already in progress. This "skews the calculus [of whether to file a claim] even further by allowing an intervenor to hitch its completely

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[2] These costs are not always monetary. For example, in *Keith v. Daley*, 764 F.2d 1265 (7th Cir. 1985), a pro-life organization sought to intervene in a suit brought by a group of physicians who challenged the constitutionality of a law that prevented them from performing abortions. While intervention was denied for reasons not implicating Article III standing, a delay in the resolution of the case would surely have imposed costs well beyond attorney's fees.

unrelated claim to a promising [claim]." *New Jersey v. EPA*, 663 F.3d 1279, 1288 (D.C. Cir. 2011) (Brown, J., dissenting).

Intervenors therefore reap the benefit of their role in extending litigation while imposing the costs of delay disproportionately on the original litigants. The original litigants may not have anticipated an intervention in deciding to pursue litigation in the first place, and their cost-benefit calculus is distorted post-hoc as they endure delays in the resolution of their case while courts occupy themselves with new issues raised by intervenors. *See* Cindy Vreeland, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. CHI. L. REV. 279, 299 (1990) ("Intervention threatens control because intervenors will usually introduce new evidence, new issues, and new positions on existing issues. . . . New parties always bring with them new costs, and intervention may so strain resources that the original parties cannot afford to maintain the suit.") This is an equal concern for plaintiffs and defendants in a case, but is particularly salient in cases surrounding public-policy controversies involving governmental bodies. There, the two sides may simply want their controversy resolved in earnest, but must worry about "their case being taken over by intervenors who present themselves as concerned citizens or public interest organization." Amy Gardner, *An Attempt to Intervene in the Confusion: Standing Requirements for Rule 24 Intervenors*, 69 U. CHI. L. REV. 701, 702 (2002); *see, e.g.*, *Sagebrush Rebellion, Inc. v Watt*, 713 F.2d 525 (9th Cir. 1982) (wildlife group intervening to protect bird habitats); *Idaho v*

Freeman, 625 F.2d 886 (9th Cir. 1980) (women's rights group seeking to intervene in case pertaining to Equal Rights Amendment).

It is not surprising, then, that judges have utilized standing requirements as "an efficacious basis for excluding intervention applicants that would expand the number of litigants in a lawsuit" amid "increasingly unwieldy party structure of cases." Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415, 440 (1991). As the Seventh Circuit has observed:

> [W]hen the extra litigant may block settlement or receive an award of attorneys' fees, it is not simply along for the ride. An intervenor is not an *amicus curiae*, even a "litigating" *amicus curiae* (one that introduces evidence at trial). The intervenor seeks control of the suit, acquires a right to conduct the case in a way that may undermine the interests of the original plaintiff (this may, indeed, be the intervenor's principal objective, if the intervenor contends that it has interests adverse to that party), and may become eligible for a separate grant of relief or an award of attorneys' fees. It is hard to treat a party such as the Council as a fifth wheel.

Bethune Plaza, Inc. v. Lumpkin, 863 F.2d 525, 531 (7th Cir. 1988). It seems incongruous that intervenors be granted full rights to control a suit without requiring the same level of interest and stake in the outcome as is required of the original parties.

II. Allowing Parties to Intervene Without Article III Standing Increases Litigation Costs for Municipalities Specifically

Some have suggested that a flexibility encouraging parties to intervene facilitates economic efficiency by allowing a single case to incorporate multiple claims, precluding "duplicative suits" and "inconsistent and conflicting decrees." Cindy Vreeland, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. CHICAGO L. REV. 279, 302 (1990). However, this would only apply to claims and claimants that have sufficient standing to bring an independent suit. For all the reasons stated above, intervenors raise costs, an issue of particular concern for government litigants.

While there is scarce available literature empirically demonstrating the actual costs that intervening parties add to suits against municipalities (and particularly those outside parties who would not be able to show Article III standing if it was required), there is ample literature on the immense costs of litigation overall on municipalities' budgets.

The number and complexity of cases involving municipalities and governmental bodies has risen in the past four decades, largely in part to the 1966 amendments to the joinder rules, which gave rise to what became known as "public law litigation." Peter A. Appell, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L. Q. 215, 215 (2000). In his seminal Harvard Law Review article that coined the term, Abram Chayes described such

litigation as revolving around a "grievance about the operation of public policy"—most often governmental policy, but frequently the policy of nongovernmental aggregates that affect numerous individuals and entities. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976).

The new rules facilitating intervention and the large pool of potential parties to draw on increased the size and frequency of lawsuits that municipalities were forced to defend against. *See* Cindy Vreeland, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. CHI. L. REV. 279 (1990). These suits, further, are particularly expensive to litigate as they "involve sprawling party structures, an emphasis on legislative fact-finding, prospective relief, ongoing decrees that affect widespread interests, and active involvement by judges." *Id.* at 280. A number of academics have argued that judges use a balancing test on a case-by-case basis to weigh the added benefits to the public that additional parties bring against the imposition they bring to the case in public-interest situations. *See, e.g.,* Carl Tobias, *Standing to Intervene*, 1991 Wis. L. Rev. 415, 439 (1991). There is no doubt however, that reduced barriers to entry in public-interest cases can attract ideologically driven intervenors who would raise costs for the original litigants not only by "making the litigation more cumbersome but also (and more important) by blocking settlement." *Solid Waste Agency v. United States Army Corps of Eng'rs,* 101 F.3d 503, 507 (7th Cir. 1996).

The risk of prolonged or convoluted litigation weighs more heavily on smaller municipalities relative to larger cities. For example, New York City was able to reduce its overall litigation costs after it began cost-mitigation policy that encouraged easy settlements to make frivolous lawsuits disappear, rather than going to court to get them dismissed. Mike Maciag, From Police Shootings to Playground Injuries, Lawsuits Drain Cities' Budgets, Governing the States and Localities (November 2016), http://www.governing.com/topics/finance/govgovernment-lawsuits-settlements.html. Smaller municipalities, like the petitioner in this case, cannot utilize similar strategies that require larger economies of scale.

An efficient framework for lawsuit resolution is integral for smaller municipalities in the context of eminent domain, which has been employed by some cities as a method of recovery from financial disasters like the Great Recession. *See* Robert Hockett, *Paying Paul and Robbing No One: An Eminent Domain Solution for Underwater Mortgage Debt*, 19 Current Issues in Econ. Fin., no. 5, 2013, at 1. Cities, like Richmond, California, use eminent domain to overcome pooled-mortgage contacts and force mortgage refinancing for underwater properties. Peter Dreier, *To Rescue Local Economies, Cities Seize Underwater Mortgages Through Eminent Domain*, The Nation (July 12, 2013), https://www.thenation.com/article/rescue-local-economies-cities-seize-underwater-mortgages-through-eminent-domain/. However, litigation can complicate and delay these efforts to use government

power to mitigate costs, an issue exacerbated by intervention. While this particular case does not appear to involve an attempt by Town of Chester to use eminent domain for these purposes, it is nonetheless illustrative of how intervening parties in other scenarios could impede on efforts to use litigation to resolve a pending matter that is weighing on the municipality and its citizens.

The controversy in question began when Laroe Estates, Inc., the respondent to this appeal and an intervenor to the original case, entered a purchase agreement with the deceased original plaintiff, Steven Sherman. *Laroe Estates, Inc. v. Town of Chester*, 828 F.3d 60, 63 (2d Cir. 2016). The parties signed the agreement in 2003, when many homeowners purchased homes at prices above post-Recession values. *Id.* Now, over a decade later, the circumstances have changed significantly, but resolution for the actual parties is nowhere in sight. The current plaintiff (Sherman's widow) has asserted that she lacks an "incentive to move the case forward" and is "unwilling to pursue the claim" herself. *Laroe*, 828 F.3d at 67. However, in allowing Laroe to intervene, the court has further prolonged a case that has already lasted for eight years since the date of filing, and sixteen years since the original plaintiff applied for subdivision approval. *Id.* (emphasis added).

The circumstances today are nothing like those the parties anticipated when litigation began. The Town of Chester continues to bear the cost of a lawsuit that the original plaintiff no longer wants to continue and

for which the intervenor has no cognizable interest. In the interest of efficiency, such situations should be prevented by requiring intervenors to demonstrate Article III standing.

CONCLUSION

For the foregoing reasons, amicus respectfully asks this Court to grant the Petition for Writ of Certiorari and reverse the decision of the Second Circuit.

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IN THE
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TOWN OF CHESTER,
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v.

LAROE ESTATES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: NOVEMBER 3, 2016
CERTIORARI GRANTED: JANUARY 13, 2017

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District Court Decision (Mar. 31, 2015) 20a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 1:12-cv-00647-ER

STEVEN M. SHERMAN,

Plaintiff,

v.

TOWN OF CHESTER, ET AL.,

Defendants.

RELEVANT DOCKET ENTRIES

Date	#	Docket Text
01/26/2012	1	NOTICE OF REMOVAL from Supreme Court, County of Orange. Case Number: 2012/000177. (Filing Fee $ 350.00, Receipt Number 465407002457).Document filed by Town of Chester, Planning Board of the Town of Chester, Town Board of the Town of Chester.(rj) (Additional attachment(s) added on 2/7/2012: # 1 Notice of Removql) (fk). (Entered: 01/31/2012)
		* * *
05/07/2012	6	MOTION to Dismiss *Plaintiff's Complaint.* Document filed by Planning Board of the Town of

Date	#	Docket Text
		Chester, Town Board of the Town of Chester, Town of Chester. (Stern, Steven) (Entered: 05/07/2012)
05/07/2012	7	DECLARATION of Steven C. Stern in Support re: 6 MOTION to Dismiss *Plaintiff's Complaint.*. Document filed by Planning Board of the Town of Chester, Town Board of the Town of Chester, Town of Chester. (Attachments: # 1 Exhibit A - part 1, # 2 Exhibit A - part 2, # 3 Exhibit B-L, # 4 Exhibit M-N, # 5 Exhibit O, # 6 Exhibit P-DD)(Stern, Steven) (Entered: 05/07/2012)
05/07/2012	8	MEMORANDUM OF LAW in Support re: 6 MOTION to Dismiss *Plaintiff's Complaint.*. Document filed by Planning Board of the Town of Chester, Town Board of the Town of Chester, Town of Chester. (Attachments: # 1 Appendix 1) (Stern, Steven) (Entered: 05/07/2012)
07/06/2012	9	MEMORANDUM OF LAW in Opposition re: 6 MOTION to Dismiss *Plaintiff's Complaint.*. Document filed by Steven M. Sherman. (Diederich, Michael)

Date	#	Docket Text
		(Entered: 07/06/2012)
		* * *
08/10/2012	11	REPLY MEMORANDUM OF LAW in Support re: 6 MOTION to Dismiss *Plaintiff's Complaint.*. Document filed by Planning Board of the Town of Chester, Town Board of the Town of Chester, Town of Chester. (Attachments: # 1 Appendix)(Stern, Steven) (Entered: 08/10/2012)
		* * *
03/20/2013	14	OPINION AND ORDER re: 6 MOTION to Dismiss *Plaintiff's Complaint* filed by Planning Board of the Town of Chester, Town Board of the Town of Chester, Town of Chester. For the reasons stated above, Defendants' motion to dismiss is GRANTED in part as to all of Plaintiffs federal claims. The case is REMANDED to the Supreme Court of the State of New York, Orange County. The Clerk of the Court is respectfully requested to terminate the motion, Doc. 6. SO ORDERED. (Signed by Judge Edgardo Ramos on 3/20/2013) (mml)

Date	#	Docket Text
		(Entered: 03/20/2013)
03/20/2013		CASE REMANDED OUT from the U.S.D.C. Southern District of New York to the State Court - Supreme Court of the State of New York, County of Orange. Sent certified copy of docket entries and remand order. Mailed via Federal Express AIRBILL # 8769 0956 6760 on 3/20/2013. (mml) (Entered: 03/20/2013)
04/18/2013	15	NOTICE OF APPEAL from 14 Memorandum & Opinion,,. Document filed by Steven M. Sherman. Filing fee $ 455.00, receipt number 0208-8429973. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Diederich, Michael) (Entered: 04/18/2013)
		* * *
05/28/2014	16	ENDORSED LETTER addressed to Judge Edgardo Ramos from Joseph J. Haspel, dated 5/28/2014. re: Please be advised that I represent Laroe Estates, Inc., which is seeking to move to intervene as a party plaintiff pursuant to FRCP 24.

Date	#	Docket Text
		ENDORSEMENT: The application is granted. A pre-motion conference will be held on June 20, 2014 at 10:15 a.m. Plaintiff and defendant are directed to submit a written response not longer than 3 pages by June 13, 2014. (Pre-Motion Conference set for 6/20/2014 at 10:15 AM before Judge Edgardo Ramos.) (Signed by Judge Edgardo Ramos on 5/28/2014) (ja) (Entered: 05/28/2014)
05/30/2014	17	ENDORSED LETTER addressed to Judge Edgardo Ramos from Steven C. Stern, dated 5/29/2014, re: Pursuant to Your Honor's individual practice rules, we request a pre-motion conference in anticipation of moving to dismiss the claims the Second Circuit's recent decision did not touch. The Court scheduled a June 20, 2014 pre-motion conference on proposed intervenor Laroe Estate's motion for intervention. ENDORSEMENT: The court will hear your request at the June 20, 2014 Pre-Motion Conference. Plaintiff is directed to submit a written response not longer than 3 pages by June 13, 2014, by the close of business.

Date	#	Docket Text
		SO ORDERED. (Signed by Judge Edgardo Ramos on 5/30/2014) (ja) (Entered: 05/30/2014)
		* * *
06/20/2014		Minute Entry for proceedings held before Judge Edgardo Ramos: Pre-Motion Conference held on 6/20/2014. Plaintiff's counsel, Michael Diederich, present, Defendants' counsel, Anthony Cardoso, present, and Proposed Intervenor's counsel, Joseph Haspel, present. Defendants are granted leave to file a motion to dismiss, and Proposed Intervenor is granted leave to file a motion to intervene, with the following briefing schedule: moving papers due August 1, 2014; opposition papers due September 15, 2014; reply papers due September 29, 2014. Proposed Intervenor is granted leave to file a motion for leave to appear as amicus curiae should it separately wish to file a brief with respect to Defendants' motion to dismiss. Defendants' opening brief with respect to their motion to dismiss, along with Plaintiff's opposition brief

Date	#	Docket Text
		thereto, may be up to 50 pages in length. (Motions due by 8/1/2014. Replies due by 9/29/2014. Responses due by 9/15/2014). (Court Reporter Samuel Mauro) (jar) (Entered: 06/21/2014)
		* * *
08/01/2014	21	MOTION to Dismiss . Document filed by Planning Board of the Town of Chester, Town Board of the Town of Chester, Town of Chester.(Cardoso, Anthony) (Entered: 08/01/2014)
08/01/2014	22	DECLARATION of Anthony F. Cardoso in Support re: 21 MOTION to Dismiss .. Document filed by Planning Board of the Town of Chester, Town Board of the Town of Chester, Town of Chester. (Attachments: # 1 Exhibit Exhibit 1 of 5, # 2 Exhibit Exhibit 2 of 5, # 3 Exhibit Exhibits 3 of 5, # 4 Exhibit Exhibit 4 of 5, # 5 Exhibit Exhibit 5 of 5)(Cardoso, Anthony) (Entered: 08/01/2014)
08/01/2014	23	MEMORANDUM OF LAW in Support re: 21 MOTION to Dismiss .. Document filed by Planning Board of the Town of

Date	#	Docket Text
		Chester, Town Board of the Town of Chester, Town of Chester. (Attachments: # 1 Appendix)(Cardoso, Anthony) (Entered: 08/01/2014)
08/04/2014	24	MOTION to Intervene . Document filed by Laroe Estates Inc..(Haspel, Joseph) (Entered: 08/04/2014)
08/04/2014	25	AFFIRMATION of Joseph J. Haspel in Support re: 24 MOTION to Intervene.. Document filed by Laroe Estates Inc.. (Attachments: # 1 Exhibit proposed complaint, # 2 Exhibit sherman complaint, # 3 Exhibit Ct of Appeals Decision, # 4 Exhibit Contract, # 5 Exhibit Settlement Agreement, # 6 Exhibit Arbitration Ruling, # 7 Exhibit Consulting Agmt, # 8 Exhibit Referee Report of Sale) (Haspel, Joseph) (Entered: 08/04/2014)
08/04/2014	26	MEMORANDUM OF LAW in Support re: 24 MOTION to Intervene .. Document filed by Laroe Estates Inc.. (Haspel, Joseph) (Entered: 08/04/2014)
09/10/2014	27	MANDATE of USCA (Certified Copy) as to 15 Notice of Appeal

Date	#	Docket Text
		filed by Steven M. Sherman. USCA Case Number 13-1503. Ordered, Adjudged and Decreed that the order of the District Court is AFFIRMED in part, VACATED in part and REMANDED in accordance with the opinion of this court. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Issued As Mandate: 09/10/2014. (Attachments: # 1 Opinion)(nd) (Entered: 09/10/2014)
		* * *
09/12/2014	29	MOTION to File Amicus Brief. Document filed by Laroe Estates Inc..(Haspel, Joseph) (Entered: 09/12/2014)
09/12/2014	30	AFFIRMATION of Joseph J,. Haspel in Support re: 29 MOTION to File Amicus Brief.. Document filed by Laroe Estates Inc.. (Attachments: # 1 Exhibit Ex A - MOL)(Haspel, Joseph) (Entered: 09/12/2014)
09/15/2014	31	MEMORANDUM OF LAW in Opposition re: 24 MOTION to Intervene .. Document filed by Planning Board of the Town of Chester, Town Board of the Town of Chester, Town of Ches-

Date	#	Docket Text
		ter. (Cardoso, Anthony) (Entered: 09/15/2014)
09/15/2014	32	DECLARATION of Michael Diederich Esq in Opposition re: 21 MOTION to Dismiss .. Document filed by Steven M. Sherman. (Attachments: # 1 Exhibit Pl. Exhibits 1-4, # 2 Exhibit Pl. Exhibit 5)(Diederich, Michael) (Entered: 09/15/2014)
09/15/2014	33	MEMORANDUM OF LAW in Opposition re: 21 MOTION to Dismiss . . Document filed by Steven M. Sherman. (Diederich, Michael) (Entered: 09/15/2014)
		* * *
10/02/2014	36	ORDER denying 29 Motion to File Amicus Brief. Accordingly, Proposed Intervenor's motion for leave to participate as amicus curie is DENIED. The Clerk of the Court is respectfully directed to terminate the motion (Doc. 29). SO ORDERED.(Signed by Judge Edgardo Ramos on 10/02/2014) (ama) (Entered: 10/02/2014)
10/13/2014	37	REPLY MEMORANDUM OF LAW in Support re: 21 MOTION to Dismiss . . Document filed by

Date	#	Docket Text
		Planning Board of the Town of Chester, Town Board of the Town of Chester, Town of Chester. (Cardoso, Anthony) (Entered: 10/13/2014)
10/13/2014	38	REPLY MEMORANDUM OF LAW in Support re: 24 MOTION to Intervene.. Document filed by Laroe Estates Inc.. (Attachments: # 1 Exhibit R&V Brief, # 2 Exhibit Gebman Brief)(Haspel, Joseph) (Entered: 10/13/2014)
03/31/2015	39	OPINION AND ORDER #105408 re: 24 MOTION to Intervene . filed by Laroe Estates Inc., 21 MOTION to Dismiss . filed by Planning Board of the Town of Chester, Town Board of the Town of Chester, Town of Chester. For the reasons stated above, Defendants' motion to dismiss is GRANTED in part and DENIED in part. Laroe's motion to intervene is DENIED. The Clerk of the Court is respectfully requested to terminate the motions, Doc. 21 and Doc. 24. The parties are directed to appear for a status conference on Wednesday, April 23, 2015 at 10:30. It is SO

Date	#	Docket Text
		ORDERED. (See Order.) (Signed by Judge Edgardo Ramos on 3/31/2015) (ajs) Modified on 4/1/2015 (soh). (Entered: 04/01/2015)
		* * *
04/08/2015	40	NOTICE OF INTERLOCUTORY APPEAL from 39 Memorandum & Opinion,,. Document filed by Laroe Estates Inc.. Filing fee $ 505.00, receipt number 0208-10791805. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Haspel, Joseph) (Entered: 04/08/2015)
		* * *
04/20/2015	45	MOTION for Reconsideration re; 39 Memorandum & Opinion,, *Notice of Motion.* Document filed by Steven M. Sherman.(Diederich, Michael) (Entered: 04/20/2015)
04/20/2015	46	MEMORANDUM OF LAW in Support re: 45 MOTION for Reconsideration re; 39 Memorandum & Opinion,, *Notice of Motion. P's Memorandum of Law with Attachments 1 & 2.*

Date	#	Docket Text
		Document filed by Steven M. Sherman. (Attachments: # 1 Attachment 1, # 2 Attachment 2)(Diederich, Michael) (Entered: 04/20/2015)
		* * *
05/05/2015	47	MEMORANDUM OF LAW in Opposition re: 45 MOTION for Reconsideration re; 39 Memorandum & Opinion,, *Notice of Motion.* . Document filed by Planning Board of the Town of Chester, Town Board of the Town of Chester, Town of Chester. (Cardoso, Anthony) (Entered: 05/05/2015)
		* * *
05/19/2015	51	REPLY MEMORANDUM OF LAW in Support re: 45 MOTION for Reconsideration re; 39 Memorandum & Opinion,, *Notice of Motion. P's Reply Brief (amended) w attachment.* Document filed by Steven M. Sherman. (Attachments: # 1 Exhibit Letter)(Diederich, Michael) (Entered: 05/19/2015)
		* * *
07/27/2016	54	MANDATE of USCA (Certified Copy) as to 40 Notice of Inter-

Date	#	Docket Text
		locutory Appeal, filed by Laroe Estates Inc. USCA Case Number 15-1086. IT IS HEREBY ORDERED, ADJUDGED and DECREED that the district court's order of March 31, 2015 is VACATED insofar as it denied Laroe's motion to intervene, and the case is REMANDED for further proceedings consistent with the opinion of this Court. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Issued As Mandate: 07/27/2016. (Attachments: # 1 Opinion)(nd) (Entered: 07/27/2016)
		* * *
08/05/2016	57	COMPLAINT against Planning Board of the Town of Chester, Town Board of the Town of Chester, Town of Chester. (Filing Fee $ 400.00, Receipt Number 0208-12618489)Document filed by Laroe Estates Inc..(Haspel, Joseph) (Entered: 08/05/2016)
		* * *
09/30/2016	62	ORDER denying 45 Motion for Reconsideration re 39 Memorandum &Opinion. Plaintiff

Date	#	Docket Text
		Nancy Sherman moves pursuant to Local Rule 6.3 for reconsideration of this Court's Order dated March 31, 2015 (Doc. 39). The motion is DENIED. An opinion will follow. The parties are directed to appear for a status conference on Thursday, October 6, 2016, at 2:30. The Clerk is respectfully directed to terminate the motion, Doc. 45. It is SO ORDERED. (Signed by Judge Edgardo Ramos on 9/30/2016) (kko) (Entered: 09/30/2016)
		* * *
10/06/2016	63	MEDIATION REFERRAL ORDER: IT IS ORDERED that this case is referred for mediation to the Court's Mediation Program. Local Rule 83.9 and the Mediation Program Procedures shall govern the mediation. The Court requests a mediator who has experience with constitutional issues pertaining to land use and zoning, as well as a background in commercial law. Please reference the following when corresponding with the Mediation Office. E-mail MediationOf-

Date	#	Docket Text
		fice@nysd.uscourts.gov, telephone (212) 805-0643, and facsimile (212) 805-0647. Mediator to be Assigned by 10/17/2016. Mediator Expertise Request due by 10/11/2016. (Signed by Judge Edgardo Ramos on 10/6/2016) (cf) (Entered: 10/06/2016)
		* * *
11/23/2016	64	ANSWER to Complaint. Document filed by Planning Board of the Town of Chester, Town Board of the Town of Chester, Town of Chester.(Stern, Steven) (Entered: 11/23/2016)
		* * *

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 15-1086

LAROE ESTATES, INC.,

Movant-Appellant,

v.

TOWN OF CHESTER,

Defendant-Appellee.

RELEVANT DOCKET ENTRIES

Date	#	Docket Text
04/08/2015	1	NOTICE OF INTERLOCUTORY CIVIL APPEAL, with district court docket, on behalf of Appellant Laroe Estates, Inc., FILED. [1480875][15-1086][Entered: 04/09/201511:49AM]
		* * *
07/13/2015	36	BRIEF & SPECIAL APPENDIX, on behalf of Appellant Laroe Estates, Inc., FILED, Service date 07/13/2015 by US mail, CM/ECF. [1552019][15-1086] [Entered: 07/13/2015 01:01 PM]
07/13/2015	37	JOINT APPENDIX, volume 1 of

Date	#	Docket Text
		2, (pp. 1-300), on behalf of Appellant Laroe Estates, Inc., FILED. Service date 07/13/2015by US mail, CM/ECF.[1552024][15-1086] [Entered: 07/13/201501:04 PM]
07/13/2015	38	JOINT APPENDIX, volume 2 of 2, (pp. 301-594), on behalf of Appellant Laroe Estates, Inc., FILED. Service date 07/13/2015 by US mail, CM/ECF.[1552029][15-1086] [Entered: 07/13/201501:07 PM]
		* * *
07/13/2015	40	CURED DEFECTIVE DOCUMENT: BRIEF & APPENDIX, [35], on behalf of Appellant Laroe Estates, Inc., FILED.[1552225][15-1086] [Entered: 07/13/201502:53PM]
		* * *
10/13/2015	51	BRIEF, on behalf of Appellee Planning Board of the Town of Chester, Town Board of the Town of Chester and Town of Chester, FILED. Service date 10/13/2015 by CM/ECF. [1618059][15-1086] [Entered: 10/13/201503:30 PM]
		* * *

Date	#	Docket Text
10/19/2015	57	BRIEF & SPECIAL APPENDIX, on behalf of Appellant Laroe Estates, Inc., FILED. Service date 10/12/2015 by CM/ECF. [1622269][15-1086][Entered: 10/19/201512:53PM]
		* * *
10/26/2015	60	REPLY BRIEF, on behalf of Appellant Laroe Estates, Inc., FILED. Service date 10/26/2015 by US mail, CM/ECF. [1627203][15-1086][Entered: 10/26/201509:18AM]
		* * *
01/27/2016	68	CASE, before GC, GEL, RJL, C.JJ., HEARD.[1692609][15-1086][Entered: 01/27/2016 01:18PM]
07/06/2016	71	OPINION, the district court judgment is vacated and remanded, by GC, GEL, RJL, FILED.[1808129][15-1086][Entered: 07/06/2016 09:22 AM]
		* * *
07/06/2016	73	CERTIFIED OPINION, dated 07/06/2016, to SDNY (NEW YORK CITY),

Date	#	Docket Text
		ISSUED.[1808143][15-1086] [Entered: 07/06/2016 09:29AM]
		* * *
07/06/2016	78	JUDGMENT, FILED.[1808812] [15-1086] [Entered: 07/06/2016 02:21 PM]
07/27/2016	79	JUDGMENT MANDATE, ISSUED.[1826760][15-1086] [Entered: 07/27/2016 03:13 PM]
09/28/2016	81	U.S. SUPREME COURT NOTICE, granting Appellee Planning Board of the Town of Chester, Town Board of the Town of Chester and Town of Chester extension to file Writ of Certiorari, FILED.[1874191][15-1086] [Entered: 09/29/2016 03:30 PM]
11/03/2016	82	U.S. SUPREME COURT NOTICE of writ of certiorari filing, dated 11/03/2016, U.S. Supreme Court docket # 16-605, RECEIVED.[1901434][15-1086][Entered: 11/07/2016 11:18 AM]
01/17/2017	83	U.S. SUPREME COURT NOTICE, dated 01/13/2017, U.S. Supreme Court docket # 16-605, stating the petition for writ of certiorari is granted,

Date	#	Docket Text
		RECEIVED.[1948897][15-1086][Entered: 01/17/2017 03:29 PM]

SUPREME COURT OF THE
STATE OF NEW YORK COUNTY OF ORANGE

No. 2012-000332

STEVEN M. SHERMAN,

Plaintiff,

-against-

TOWN OF CHESTER, ITS TOWN BOARD,
AND ITS PLANNING BOARD,

Defendants.

COMPLAINT

Plaintiff STEVEN M. SHERMAN, through his attorney MICHAEL D. DIEDERICH, JR., complains of the DEFENDANTS as follows:

Introductory Statement

After making application to the Town Planning Board in 2000 seeking subdivision approval so that he could use and profitably sell the real property that he had acquired, the Town of Chester employed its police powers in a manner that has deprived Plaintiff of the use and enjoyment of his 398 acres of land ("MareBrook"). Consequently, Plaintiff sought relief from the federal courts in *Sherman v. Town of Chester et al,* 08 Civ. 4248 (VLB) in May 2008. In that federal action, the Defendant Town of Chester urged that the State courts should adjudicate

the matter. Plaintiff agrees that the State courts are a more appropriate forum at this juncture; has voluntarily dismissed the federal action; and brings this action within 30 days thereof as permitted by 28 U.S.C. § 1367(d).

THE PARTIES

1. Plaintiff STEVEN M. SHERMAN is and was, at all times relevant herein, a citizen of the United States and a resident of the Town of Monroe, County of Orange, and State of New York.

2. Defendant TOWN OF CHESTER (hereinafter "Defendant Town" or "Town") is and was, at all times relevant herein, a municipal corporation organized and existing under the laws of the State of New York, with its Town Hall located at 1786 Kings Highway, Chester, NY 10918.

3. Defendant TOWN BOARD OF THE TOWN OF CHESTER (hereinafter "Town Board") is and was, at all times relevant herein, the duly elected governing body of the Defendant Town.

4. Defendant PLANNING BOARD OF THE TOWN OF CHESTER (hereinafter "Planning Board") is and was, at all times relevant herein, the duly appointed planning board of the Defendant Town.

FACTUAL ALLEGATIONS

A. Plaintiff's sound land use proposal—the MareBrook Project

5. Plaintiff is a real estate developer and owner of a substantially undeveloped 398 acre parcel of land (hereinafter "MareBrook"[1]) located in the Town.

6. Plaintiff contracted for the acquisition of MareBrook in 2000 with a view toward using and developing the land in an economically-profitable and environmentally-sound manner, consistent with surrounding land use and character of the community.

7. For many years before Plaintiff's purchase of MareBrook, and up through the present, Plaintiff's MareBrook land has been zoned to allow for residential use.

8. When Plaintiff contemplated purchasing the MareBrook property between 1999 and 2001, MareBrook contained potentially 568 buildable lots under the Town's zoning and its land use Master Plan.

9. In March 2000, Plaintiff applied to the Town's Planning Board for subdivision approval so that he could use and develop MareBrook.

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[1] Plaintiff uses this name because the land had been a horse farm, including a stream. Plaintiff's original proposal included equestrian recreation, with the proposed development named "MareBrook Estates." MareBrook is also denominated in land use applications as "Chester Golf" or "Chester Golf Club," which property is located on six tax parcels near or adjoining Bull Mill Road, Laroe Road and Gibson Hill Road in the Town. The Tax Parcels are section 8, block 1, lot 20 & 56 and section 1, lots 9.1,9.2,65.1 and 65.2.

B. Original MareBrook proposal, with Golf Course

10. Plaintiff's proposed MareBrook project was for residential housing totaling 385 units, located upon 398 acres, in a new community featuring an equestrian facility, baseball field, tennis courts, clubhouse, on-site restaurant and a golf course that wove through the property.

11. A conceptual map depiction of Plaintiff's original proposal, the "MareBrook project," is annexed as Exhibit "1".

12. Under Plaintiff's original MareBrook Project proposal, the golf course and other recreational facilities would be available to both the residents of the new community and the public at large, including all residents of the Town of Chester.

13. Plaintiff's proposed MareBrook project, including its recreational facilities and the number of residential housing units proposed, was fully consistent and permissible under the Town's existing zoning, its zoning policies, and the existing 1974 land use Master Plan.[2]

14. Plaintiff's proposed MareBrook Project was also fully consistent and permissible under the Town's subsequently revised Master Plan, which was adopted in May 2003; and it was consistent in nature, purpose and extent with all of the zoning ordinances and zoning ordinance amendments that

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[2] Comprehensive Plan" and "Master Plan" plan are used interchangeably herein, and with the same meaning.

the Town Board subsequently enacted (ostensibly in furtherance of the Town's 2003 Master Plan).[3]

15. The MareBrook Project never involved greater housing density on the parcel than was generally found and permitted in the Town. Plaintiff's proposal, including the proposed number of housing units, was appropriate for the acreage of the proposed development, the natural characteristics of the land and the suburban character of the local community.

16. Plaintiff's MareBrook Project, as originally proposed, would significantly enhance the land uses that characterized this area of the Town and would be of significant benefit to the Town; including, but not limited to, providing quality housing, especially to retired and semi-retired people desiring pleasantly-situated housing with associated recreational and social facilities.

17. Plaintiffs project, as originally proposed, would have created a significant tax ratable for the Town and otherwise be economically beneficial to the Town and the community.

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[3] In New York State, a municipality's zoning ordinance should implement the municipality's master or comprehensive plan. A community's Master Plan should be its "blueprint" for development. As stated in a N.Y.S. Department of State publication entitled Creating the Community You Want: Municipal Options For Land Use Control (2009), at page 2: "Zoning is a land use technique that can be used to help implement a municipality's [master] plan." *See*, http://www.dos.state.ny.us./lp/publications/Creating the_Community_You_Want.pdf

18. At the time of Plaintiff's MareBrook application in 2000, and through today, there is a regional need for housing for active-retired and semi-retired people. Plaintiff intended to market his MareBrook Project to such individuals by providing affordable housing with a variety of recreational and social facilities and amenities.

19. At the time of Plaintiffs original application, and continuing thereafter, the Town Planning Board was very receptive towards and expressed a great liking for Plaintiff's MareBrook Project.

20. However, with the intention of keeping Plaintiff's MareBrook land undeveloped and largely forested, the Town Board, as the Town's legislative and policy-making body, undertook a course of action, which had the design and effect of obstructing and preventing Plaintiff from using, subdividing and developing his property.

21. The intention and result of the Town Board's acts and omissions regarding MareBrook has been to create a *de facto* nature preserve. MareBrook adjoins Goose Pond Park, a New York State park.

C. Town's obstruction of MareBrook Project

22. The means and strategy employed by the Town to obstruct Plaintiff's ability to use and develop MareBrook was through a continuous series of changes of its land use regulations, both via Town Board legislation and the Town administration of its land use application process.

23. First, between 2001 and mid-2007, the Town employed tactics of constantly zoning and re-zoning Plaintiff's land with repeated changes to the Town's land use ordinances.

24. In addition, the Town Board refused to act on Plaintiffs MareBrook application when such action was needed by the Planning Board, obstructing Plaintiff from obtaining subdivision approval.

25. After Plaintiff filed a federal lawsuit on May 5, 2008, the Town changed its tactics, but not its strategy of obstruction. It asserted its regulatory power through administrative means, using bureaucratic and procedural means and its consultants to continue to obstruct Plaintiff's subdivision application.

26. In addition to asserting its regulatory powers, the Town has infringed upon and denied Plaintiff's First Amendment right to petition local government for redress of grievances relating to the Town's actions.

27. In this regard, the Town retaliated against Plaintiff for his attempted exercise of his constitutional right to petition government.

28. Specifically, after filing his federal action seeking the federal Court's help in May 2008 (a judicial petition), the Town engaged in administrative obstruction, including:

- refusing to allow Plaintiff to appear and further process his application before the Planning Board, with no proper reason and no reason given;
- imposing unreasonable and unjustified demands upon Plaintiff from the Town's technical consultants (e.g., its planner and its engineer, and their successors);
- imposing unreasonable, unauthorized, duplicative and grossly excessive financial exactions in the form of consultant fees; and

- demanding much more than what was reasonable to demand or require of Plaintiff in connection with the Final Environmental Impact Statement ("FEIS"), which the Town required of Plaintiff before considering preliminary approval, at an exorbitant cost of money and time.

29. As to the above, Plaintiff has been singled out for hostile and adverse treatment by the Town.

30. Plaintiff has been singled out because the Town Board prefers a *de facto* nature preserve rather than reasonable residential development.

31. Additionally, upon information and belief, the Town's hostility toward Plaintiffs residential development of his land includes the fear that the residential housing may become inhabited by ultra orthodox or Hasidic Jews, and that an ultra Orthodox Jewish village could be created. Specifically, some of the Town's voting public has been fearful that Plaintiff's MareBrook could become a potential Hasidic community such as that found in the nearby Village of Kiryas Joel.

32. Plaintiff is Jewish, and has enjoyed the help of Orthodox Jewish affiliates and lenders in pursuing MareBrook. Upon information and belief, this has also caused anti-Semitic hostility toward his project. For example, his model home located on MareBrook has been vandalized with spray-painted Nazi swastikas—vandalization which is the product of local hostility towards Orthodox Jews.

33. Although Plaintiff's land use application remains pending before the Town's Planning Board, he has lost almost his entire initial investment and

subsequent financial contributions and labor as a developer.

34. Specifically, as a result of the obstruction by the Town summarized above (and set forth below in detail), by 2011, Plaintiff has lost over 90% of his financial interest in MareBrook, which property remains unusable and undevelopable without subdivision approval.

35. Plaintiff may suffer a complete loss of his investment and invested funds, and face personal bankruptcy.

36. Plaintiff has already experienced foreclosure and collection action; and his commercial lender has obtained a personal judgment against him in the sum of over $4 million.

37. Because Plaintiffs economic interest in MareBrook has been almost entirely destroyed by the actions of the Town, his business enterprise essentially ruined, and his labor as a developer lost, he seeks relief from this Court.

38. A chronology of local governmental abuse committed by Defendant is described in detail below.

D. Years 2000-2002

39. Plaintiff's original 2000-20001 expenditures for the MareBrook project included the approximately $2,700,000 purchase price; and, thereafter, carrying costs (mortgage interest, taxes, etc.).

40. After contracting for the purchase of MareBrook, Plaintiff began preparing a conceptual map, which was developed through meetings with the Town's Planning Board through the Spring of 2000.

41. In April 2000, Plaintiff formally submitted his MareBrook subdivision application to the Town Planning Board.

42. The Planning Board declared itself "lead agency" under SEQRA on June 21, 2000; and thereafter, in November of 2000, conducted a public hearing on the scope ("scoping session") required by SEQRA.

43. The Planning Board was very receptive and enthusiastic about Plaintiff s MareBrook Project, recognizing that the project's attractiveness and qualities were fully consistent with Town's land use philosophy and community character.

E. July 2001 Moratorium

44. The Planning Board appeared to embrace and like the substance and conceptual details of Plaintiff's proposal.

45. However, after Plaintiff began making substantial progress in putting together an application suitable for full consideration by the Planning Board, the Town Board announced, on or about July 1, 2001, that it was imposing a "six-month moratorium" on major subdivision approvals, retroactive to May 1, 2001.

46. The Town Board's Moratorium appears to have been enacted to apply only to Plaintiff. He was singled out by it.

47. At least two members of the Town Board (council members Florio and Grumbach) expressed the view that the Moratorium was specifically aimed at Plaintiff's MareBrook project.

48. Plaintiff was the only developer affected by the Moratorium, even though several developers had

pending projects before the Planning Board and were not differently situated.

49. As to the Moratorium, Town Supervisor William Tully announced that any land use application formally submitted before May 1, 2001 could continue. Plaintiff's application had been submitted before May 1, 2001, yet Supervisor Tully and the Town Board regarded his project as subject to the Moratorium, singling Plaintiff out for adverse treatment.

50. In November 2002, the Town extended its Moratorium beyond the initial period of six months provided by the Moratorium law, in contravention of its own local law. Plaintiff was singularly affected.

51. Plaintiff then sued the Town under CPLR Article 78 to end the Moratorium.

52. As a result of Plaintiff's lawsuit, the Town ended its Moratorium in January 2003.

53. Nevertheless, the Town thereafter continued what has amounted to an ongoing *de facto* moratorium regarding the development of the MareBrook land. It has accomplished this by constantly changing its land use laws and requirements whenever Plaintiff's MareBrook application neared decision on preliminary approval (an important stage under New York land use law).

F. Town's refusal to consider Plaintiff's petition for a minor subdivision

54. As Plaintiff needed some positive cash flow because of the delay caused by the Moratorium, in December 2001, Plaintiff sought a minor subdivision approval in order to sell a portion of his 398 acres of MareBrook land.

55. A minor subdivision of land was permissible in 2001, even under the Town's Moratorium.

56. Plaintiffs minor subdivision application was essentially a petition to the Town to partially redress Plaintiff's grievance that the Town's Moratorium law was preventing Plaintiff from using, developing and selling his land.

57. However, the Town refused to permit Plaintiff to pursue a minor subdivision application.

58. There were no justifiable grounds for the refusal to allow Plaintiff the approval of a minor subdivision. A minor subdivision is 4 or fewer lots. It would have imposed no burden upon the Town to have allowed Plaintiff to sell some of his property by allowing a minor subdivision. Doing so would have permitted Plaintiff at least some economic use of his land.

59. By denying Plaintiff the ability even to propose a minor subdivision, the Town denied Plaintiff a basic property interest in land, namely, the ability to use and sell property.

60. In denying Plaintiff the ability to apply for a minor subdivision, the Town deprived him of the right to petition Town government for redress, namely, to be allowed to use, subdivide and profitably engage in a developer's trade—the profitable improvement and sale of land.

61. In denying Plaintiff the ability to apply for a minor subdivision, it appears that the Town was also retaliating against him for having availed himself of his First Amendment right to petition government to redress grievances, namely, his Article 78 challenge to the Town's Moratorium.

G. MareBrook Project resumes in 2003

62. After the Town lifted the Moratorium in January 2003, the Town's Planning Board examined the "scope" that was previously addressed in 2000; and approved a revised scope in March 2003, as a prelude to the preparation of an Environmental Impact Statement ("EIS").

63. On March 3, 2003, the Planning Board directed Plaintiff to proceed with the Draft Environmental Impact Statement ("DEIS")—a document comprised of 3 volumes totaling over 1000 pages of narrative, charts, tables and maps. Plaintiff also prepared a full 62 page set of engineered subdivision plans for the MareBrook Project. The DEIS and plans were given to the Planning Board and its consultants (Planner Garling Associates and Town Engineer Gerald Macdonald) in late March 2003.

64. Plaintiff then continued with his application (a petition to the Town) before the Planning Board, taking into full consideration the Town's new May 2003 Master Plan. This new Master Plan was adopted on May 1, 2003, which was almost exactly two years after the effective date of the Moratorium.

65. The 2003 Master Plan was not significantly different from the prior Master Plan regarding the character and nature of land uses allowed or desired by the Town. There was nothing in the new Master Plan that contradicted or disfavored the uses proposed by Plaintiff. Plaintiff's proposal remained completely consistent with the new Master Plan.

66. Planning Board members were on the committee that helped formulate the proposed 2003 Master Plan, which Master plan emanated from the Morato-

rium. The Town's planner, Garling Associates, was a principal author of the new Master Plan; and also was and remained the planning advisor to the Planning Board.

67. Upon information and belief, if the new Master Plan had identified or created new environmental considerations or issues for Plaintiff's MareBrook Project, the Planning Board could and would have required that these be identified and added to the MareBrook DEIS.

68. The Planning Board did not raise any new considerations or issues of environmental concern regarding MareBrook relating to the Town's May 1, 2003 Master Plan.

69. During the next few months, Plaintiff and his consultants worked with the Town's consultants in creating a DEIS deemed acceptable by the Planning Board and "complete" for its consideration.

H. MareBrook application "deemed complete" by Planning Board

70. After various reviews and changes made during the Summer and early Autumn of 2003, Plaintiff's DEIS was "deemed complete" by the Planning Board on October 15, 2003, meeting all zoning and 2003 Master Plan requirements.

71. Plaintiff submitted a full set of final subdivision plans and drawings with his now complete DEIS.

72. Plaintiff expended a great deal of money, and a large investment in time, in satisfying the Planning Board that his 1000+ page DEIS was now "complete."

73. Being "deemed complete" is an important determination, because it established that Plaintiff's application to the Town was now satisfactory in form and content and complied with the new Master Plan. Completeness also triggers the start of the 62 days within which the municipality must act on the application, under N.Y.S. Town Law § 274-a.

74. Thus, at this point in time, namely, with a complete DEIS accompanying his application, subdivision plans and drawings, Plaintiff was entitled to a formal hearing on his application by the Planning Board within 62 days.

75. A municipality's failure to provide such a hearing entitles the applicant to a default approval, upon request, under N.Y.S. Town Law § 276 (8).

76. Thus, the Town had 62 days to afford Plaintiff a hearing on his application for preliminary approval. Otherwise, it would be deemed approved upon Plaintiff's request under the default approval provision of state law.

77. Plaintiff did not receive the required hearing. Plaintiff eventually requested a default approval under Town Law § 276 (8), after it became apparent that the Town had been acting in bad faith regarding his MareBrook application (Plaintiff's request has not yet been formally denied).[4]

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[4] There is no time limit contained in the N.Y.S. Town Law (and in particular Town Law § 276(8)) as to when Plaintiff can request from the clerk a "default approval." Plaintiff eventually requested one based upon the Town's obstinacy, its constant changing of its land use requirements, and its refusal to act in

78. Sherman Expenditures: Costs from the beginning of the project (other than land purchase costs) through the DEIS/application being "deemed complete" by the Planning Board in October 2003 were approximately **$684,869**.

79. Plaintiff would not have expended this huge sum had the Town's officials not affirmatively led him to believe that they very much liked, and would approve,[5] his MareBrook proposal.

80. The above $684,869 includes engineering work, preparation of the DEIS, preparation of subdivision maps and drawings, some general infrastructure costs, and some actual development costs including installation of wetland fencing and the cost of a "model home."[6]

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good faith toward his legitimate interests as a property owner trying to use, develop and/or sell his land.

[5] This is not mere wishful thinking on Plaintiff's part. As described below, the Planning Board subsequently recommended Plaintiff s MareBrook application for approval to the Town Board in 2005 (with the Town Board failing to act on the recommendation).

[6] Plaintiff built, at a cost of approximately $120,000, a 90% completed "model home" for potential purchasers to view, based upon his reasonable expectation that he met all requirements under the Town's land use philosophy, as reflected in its Master Plan, and met all the requirements of the Town's zoning.

[7] Approximately 80% of the Town's real property taxes are earmarked for the local school district.

I. Entitlement to a public hearing on MareBrook Project denied

81. Plaintiff should have received a public hearing by mid-December 2003, in order for the required hearing to be within 62 days from when Plaintiffs MareBrook Project was deemed complete.

82. However, the Planning Board, apparently at the behest of the Town Board and its planner, Garling Associates, refused to schedule a hearing for Plaintiff in December.

83. Rather, it placed Plaintiffs MareBrook Project on the Planning Board agenda for early January 2004, which formal meeting was then canceled due to a lack of a Planning Board quorum. The board members (conveniently) failed to appear, upon information and belief, at the behest of the Town Board's planner and/or engineer.

84. Shortly thereafter, Plaintiff learned that the Town Board had, without notice to Plaintiff, changed the Town's zoning with a new zoning ordinance effective in late December 2003 (hereinafter "December 2003 Zoning").

85. Upon information and belief, the Town Board took unlawful shortcuts in enacting its December 2003 zoning law, in order to stifle and obstruct Plaintiff's MareBrook application.

86. Upon information and belief, the Town failed to refer its proposed zoning changes to the Planning Board and/or Orange County Department of Planning, as required by N.Y.S. GML 239-1 and § 239-m, or notify adjoining towns if the zoning amendment was town-wide; and failed to refer the proposed zoning changes to the Planning Board for a report, as

required by Chester Town Code § 98-39 before a zoning amendment can be adopted.

87. In February of 2004, the Town's consultants, including Town Planner Garling Associates, informed Plaintiff of the new December 2003 Zoning.

88. Garling Associates assured Plaintiff that with a modest amount of additional work, Plaintiff could meet all requirements of the December 2003 Zoning. The new zoning was described as being consistent (as it must be) with the Town's May 2003 Master Plan; and Plaintiff's MareBrook Project, when it was deemed complete in October 2003, was at that time viewed by the Planning Board as being in conformity with the 2003 Master Plan.

89. Therefore, Garling Associates assured Plaintiff that he could soon obtain preliminary subdivision approval from the Planning Board under the new December 2003 zoning.

90. Had the Town and its consultants not pushed through the new December 2003 zoning law, and had it not unlawfully denied him a hearing on his application for preliminary approval, Plaintiff would have had received preliminary subdivision approval in mid-December 2003.

J. January 4 – June 2004

91. Through the delay of Plaintiff's public hearing date into January 2004, Plaintiff could have promptly sought and obtained a "by right" default approval, which default approval he did not seek because of the inducements the Town promised, as described below.

92. Thus, Plaintiff would have received a substantial vested right to his MareBrook Project, namely,

preliminary approval of his subdivision application if the Town had not made a last minute zoning change.

93. The Town's representatives gave assurances that the new zoning would not materially impact Plaintiffs project. It gave Plaintiff inducements to proceeding forward with his application.

94. For example, in January 2004, Plaintiff accepted Garling Associates' representations and assurances at face value that Plaintiff would soon be able to obtain preliminary approval from the Planning Board.

i. Potential remedy of default approval would be Pyrrhic victory

95. These assurances were the principal reason that Plaintiff did not consider seeking a legal remedy, such as pursuing a default approval in early 2004.

96. The application still needed final approval from the Planning Board. Thus, receiving a default approval would most likely be a Pyrrhic victory since it would anger the Town and further delay and otherwise prejudice the application. Thus, the most sensible approach for seeking preliminary approval was for Plaintiff to be as cooperative as possible with the Town.

ii. Plaintiff seeks to comply with the new zoning

97. Because insistence upon a default approval would be an unsatisfactory result, as the result would be a non-conforming use, it would serve little beneficial purpose and undoubtedly be futile for Plaintiff to do anything other than to diligently

proceed forward and promptly comply with the new December 2003 Zoning.

98. However, the December 2003 Zoning had thrust several regulatory changes upon Plaintiff and his MareBrook Project.

99. Section 98.25 of the new December 2003 zoning code changed the zoning requirements for lots. The new zoning required a 100 foot buffer from streams located within MareBrook, namely, Seeley Brook, Trout Brook and Walden Creek, and required buffers from wetlands. The zoning law change required that Plaintiff reconfigure his subdivision map to move homes away from the streams, forcing Plaintiff, at considerable expense, to reengineer a large number of lots and large segments of the proposed roads.

100. The Town, through new Zoning Code § 98.25, enacted a floating zone called a Planned Adult Community, or "PAC," in the SR-2 zone, and made any proposed PAC subject to Town Board approval. Plaintiff had been induced by the Town to add a PAC to his MareBrook Project application because it would give him the unit count (number of homes) economically necessary to continue with a golf course.

101. This required a new engineered plan for the SR-2 area of the property, as the type of housing and lot sizes had to be changed again with a considerable expenditure of time and money.

102. Additionally, the December 2003 Zoning law made the Town Board the approval authority for clustering.

103. Plaintiff applied for clustering, and devoted considerable resources to incorporating clustering into his MareBrook application, especially as he was induced to do so by the Town through its grant of a "density bonus" in its December 2003 zoning. This delayed the Planning Board for several months because the December 2003 zoning required the approval of the Town Board for clustering.

104. Plaintiff would not have sought clustering if he had known that the Town's grant of a "density bonus" (an incentive for the developer to cluster in the Town's AR.3 zoning district) was really only a ploy by the Town—a disingenuous invitation to pursue a desirable technique for land use development (clustering) while intending only to delay Plaintiff and not grant the clustering request.

105. From early January 4, 2004 through late May/early June 2004, Plaintiff revised his MareBrook Project application by taking such actions, such as reconfiguring his subdivision map to move homes away from the streams; creating a new engineered plan for the SR-2 area of the property for a PAC; and seeking the Town Code-required approval from the Town Board for clustering and the PAC.

106. Additionally, in order to be granted a "density bonus" by the Planning Board, the builder was required to demonstrate that he could place a house on a 2 acre mapped lot with a minimum 25 foot depth and a 5,000 square foot (but not necessarily rectangular) footprint. Plaintiff devoted considerable effort to meeting this requirement.

107. Plaintiff was also forced to reduce the number of townhouses under the PAC formula to a maximum of 40 apartments, and up to 185 single family units.

As a result, Plaintiff's total number of housing units was reduced from 385 to 365.

108. Before Plaintiff could obtain Town Board approval, the new zoning code required that the Planning Board first approve a clustering plan and a PAC after a yield plan was completed. The Town Board then had to vote on whether or not to accept the PAC and cluster.

109. This requirement—that the Town Board itself approve clustering—was inserted for the first time in the December 2003 zoning. The intent is obvious—to allow the Town Board to supervise the Planning Board regarding Plaintiff's MareBrook application.

110. The December 2003 zoning law provisions requiring Town Board approval of clustering was aimed specifically at Plaintiff, as there were no other clustering applications pending in the Town at that time.

111. The requirement for Town Board approval of clustering also appears to have been illegal, as N.Y.S. Town Law § 278(D)(1) clearly provides that cluster approval is within the exclusive discretion of the Planning Board, not the Town Board.

112. However, this illegality was of no true concern to the Town Board, because secretly it intended to never approve Plaintiff's MareBrook clustering and PAC requests.

113. One indication of this malicious intention is that having (unlawfully) made itself the approving body on cluster zones, the Town Board then failed and refused to act on the Planning Board's request to approve Plaintiffs cluster zone and PAC. Without formal action by the Town Board, Plaintiff could not

move forward with either the cluster plan or the PAC plan under the Town ordinance. The Town Board's inaction intentionally created a roadblock for Plaintiffs MareBrook Project.

114. Further evidence of the Town Board's intent to obstruct Plaintiffs project is found in the conduct of the Town Board's planning consultants, Garling Associates. As mentioned above, Plaintiff was induced by Garling Associates to view the December 2003 zoning amendments as manageable. Yet, Garling Associates was actively involved in changing that zoning again in June 2004 at the very same time that it was advising and directing Plaintiff (and the Planning Board) on how to meet the December 2003 Zoning.

115. Garling Associates further revealed themselves to be agents of the Town Board when, at a Planning Board meeting held in March 2004, Garling Associates purported to be unclear about several provisions of the December 2003 zoning relating to a "yield plan" under the clustering provisions of the Zoning law.

116. These were provisions written by Garling Associates.

117. These alleged uncertainties were then employed by the Town as a means of preventing Plaintiff with going forward on his MareBrook Project.

118. Thus, it appears that the Defendant Town and its agents intentionally enacted a zoning law which, by Defendant's own admission, the Defendant Town viewed as unclear and ambiguous on its face.

119. The Town Board's subsequent 2004 zoning law thus denied Plaintiff the ability to proceed with his

proposal when, on its face, it was fully consistent with and approvable under both the Town's new 2003 Master Plan and its December 2003 Zoning.

120. Plaintiff, at this point in time, had devoted substantial money, time and labor resources in his MareBrook Project; had a deemed complete DEIS; and had been given substantial assurances by the Town and its representatives.

121. At this point in time, his property right became vested under the N.Y.S. Court of Appeals teachings in *Glacial Aggregates LLC v Town of Yorkshire*, 14 N.Y.3d 127, *rearg denied* 14 N.Y.3d 920 (2010).

122. Specifically, Plaintiff justifiably thought, and had the right to expect, that the Town's new 2003 Master Plan and 2003 Zoning defined what he was or was not permitted to do regarding MareBrook, and that the Town's assurances that satisfying the modest changed requirements imposed by its December 2003 Zoning would result in approval of his MareBrook Project. This is especially so since a simple "conventional" subdivision design would, on its face, be approvable, even though such a conventional design would be a more intensive use.

123. The Town's post-December 2003 actions toward Plaintiff's MareBrook proposal (such as imposing stringent environmental review and other technical requirements and repeatedly revising its land use laws in direct response to Plaintiff's application) were as if the Town's new zoning law was a profoundly significant change in its zoning law and policy for land such as MareBrook.

124. Yet, this could not legitimately be the case, as the Town had issued a "negative declaration" ("NegDec") under the environmental impact review requirements of the N.Y.S. Environmental Quality Review Act ("SEQRA"). *See*, N.Y.S. Environmental Conservation Law article 8.

125. In so doing, the Town made an official finding that no environmentally significant effects would result from its proposed December 2003 zoning law, nor the subsequent re-zonings (which were also NegDec'd).

126. Its land use law changes could have a profound impact on the environment (especially sequential changes, stifling developers' ability to know what the Town's land use philosophy is). Therefore, the Town should have prepared its own EIS or generic EIS, or supplemental generic EIS (if one had been prepared for the 2003 Master Plan).

127. The Town's NegDec's were, upon information and belief, both disingenuous and a perpetration of fraud upon Plaintiff. The NegDec's corroborated the representations of the Town's consultants and Town Supervisor that the Town's new zoning laws (singularly or cumulatively) were not a big change, and would have little impact upon Plaintiff's MareBrook application and its approval. Yet, in actuality, the Town Board was singling out Plaintiff's MareBrook application for obstruction and denial.

128. The Town was engaging in a strategy of constantly making huge "environmental" demands of Plaintiff regarding revising and updating his DEIS, and then demanding a Supplemental Draft EIS ("SDEIS") even though Plaintiff's original DEIS had already been "deemed complete" by the Planning

Board in October 2003; and, otherwise, abusively applying SEQRA, even up to today in connection with Plaintiff's FEIS.

129. Thus, the Town's NegDec's characterized the Town's zoning law changes as environmentally insignificant. Yet, in actuality, the only way Plaintiff's MareBrook application could be viewed as not involving potential environmental impacts under the Town's new zoning and re-zoning would be if the Town intended never to allow Plaintiff's MareBrook proposal. This is further evidence that Plaintiff was being singled out for adverse action by the Town.

130. Further in this regard, one of the Town's principal consultants has admitted that the Town was singling out Plaintiff for adverse treatment. The Town engineer acknowledged this, by stating in a letter dated on June 6, 2007 that the Town's zoning was twice amended, on June I, 2004, and again on June 7, 2005, to "clarify" what Plaintiff was entitled to build under the Town's zoning.

131. Specifically, three years after the Town's 2004 zoning change, the Town Engineer wrote in his letter dated June 6, 2007 that:

> "[we have had] several questions of the new Zoning Amendments on the language and intent of the yield plan. Especially the Cluster Bonus Provisions in 98-25C and the 'LOTS TO BE BUILDABLE' section of the Subdivision regulations 83-22. These reviews and discussions with the applicant resulted in Town Board Zoning Amendments to provide further clarifications (June 1, 2004 and June 7, 2005). Also the PAC design now required a 25 foot setback or buffer."

132. This letter reveals that the re-zonings were directed specifically at Plaintiff. Plaintiff was being singled out for adverse zoning treatment by the Town. It states that the rezoning were to "provide further clarification." Yet, Plaintiff did not regard the 2003 zoning as unclear. Rather, Plaintiff believes the zoning, and Plaintiff's ability to subdivide and develop MareBrook, was absolutely clear under the December 2003 Zoning.

133. The zoning law changes were enacted by the Town Board as a device to be used to delay and obstruct Plaintiff's MareBrook Project. No other pending land use applicant was similarly adversely affected.

134. As described below, each of the new zoning law amendments imposed unnecessary and unreasonable requirements upon Plaintiff, such as requiring completely new yield plan maps, entirely new subdivision plans, and unnecessary modifications to Plaintiff's DEIS.

K. June 2004 Zoning changes/amendments

135. Notwithstanding Garling Associates assurances, the Town's new June 2004 zoning regulations were major changes that required an almost complete revamping of the MareBrook Project. The new zoning contained, among other things, a new prohibition regarding condominiums, a "concept plan" requirement for any PAC, and new, unreasonably-convoluted clustering.

Condominiums

136. In the Town's June 2004 zoning amendments, the Town prohibited condominiums; and, instead, demanded only single family dwellings. This change

(enacted after a NegDec despite its societal and potential environmental impact) would possibly increase Town real property taxes, but would result in less diversified housing and less affordable housing for the elderly—the very people the Town ostensibly sought to aid through its demands that Plaintiff create a PAC.

137. Plaintiffs MareBrook Project had included condominiums, as this form of ownership reduced the real property taxes paid on each home by approximately 30%. With the 2004 zoning amendment, the residents in the (supposedly more affordable) Planned Adult Community would be forced to pay 50% more in local real property taxes than they would if allowed to live in condominiums.

138. This was irrational because the PAC community, by definition, would not generate school age children. In a "senior" community, there was no rational basis for denying prospective owners the ability to purchase a condominium.

139. As a result, Plaintiff could only sell town houses to potential buyers due to the Town's demand, which imposed higher real property taxes upon these senior residents.[7]

140. The elimination of condominiums and attendant increased cost impaired the potential profitability of Plaintiff's originally-proposed PAC community. Plaintiff was compelled by the 2004 zoning code changes to revise his proposal so that all PAC

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[7] Approximately 80% of the Town's real property taxes are earmarked for the local school district.

units within the MareBrook Project were single family ranch houses.

141. For example, sufficient PAC housing density was required in order for Plaintiff to economically afford open space and public recreation for Plaintiff's proposed MareBrook golf course, yet the Town did not address these aspects of its proposed land use law in an EIS prior to enactment.

142. The above issues should have been addressed by the Town in the form of an EIS regarding its proposed December 2003 and subsequent zoning law enactments, but were not. The Town NegDec'd its proposed zoning law changes; and then enacted zoning changes that required a great deal of time, effort and expenditure by Plaintiff.

143. By not undertaking SEQRA review of its proposed zoning law changes, the Town left land use applicants, such as Plaintiff, in the dark regarding Town policy and preferences. It left applicants and citizens alike in the dark as to what the Town deemed to be environmentally significant in land use matters.

"Concept plan" for a PAC

144. A second zoning change was the Town's new requirement that a concept or "sketch" plan be developed for a PAC. *See*, Town Code § 98.25 (C & D). In order to demonstrate suitable acreage and access, the Town declared that a concept plan shall be provided showing roadways, open spaces, housing areas, wetlands, recreation areas and other site features in a broad conceptual fashion adequate for the Planning Board to determine suitability of the site for a PAC district.

145. This new "Concept Plan" procedure created a huge amount of unnecessary work on Plaintiff's part. Specifically, it forced Plaintiff to engineer the total useable land, and show a detailed layout conforming to the restrictions before going to the Town Board for a PAC.

146. This new procedure appeared targeted at Plaintiff, and designed to further burden and obstruct his MareBrook Project, as his was the only PAC application.

Town's demands regarding "Clustering"

147. The Planning Board also could require "clustering" or "average density" zoning. The procedures are set forth in Code § 98.25(C), and essentially involve a process, which could be unreasonably applied, as it was toward Plaintiff, to force a developer to essentially prepare plans and documentation for two types of development rather than one.

148. First, under the Town's clustering ordinance, the developer must submit a sketch plan. Then, the developer and Planning Board must discuss whether clustering will result in "benefits to the Town" (§ 98-25(C)(1 & 2). Next, if the Planning Board determines that clustering "may be appropriate," it must direct the developer to prepare a "yield plan" essentially showing what would be allowed under conventional ("by right") zoning. The Planning Board then decides "allowable density" based upon what it deems an "acceptable yield plan." The developer can then submit a "sketch cluster plan" to be used at a "preliminary public information meeting." (§ 98-25(C)(3).) After the Planning Board accepts the developer's conventional/yield plan meets all requirements, it "may" hold the above-mentioned

preliminary public information meeting, after public notice, inviting the public to ask questions and make comments. (§ 98-25(C)(4)). Then, "upon receipt of acceptable cluster and conventional or yield plans .., as reviewed to determine conformance with the Town regulations, the Planning Board shall begin SEQRA review...."

149. Upon information and belief, the new procedure appeared designed to burden and obstruct Plaintiffs MareBrook Project because Plaintiff had petitioned the Town to allow what any impartial observer would regard as a land use more desirable than a conventional design, namely, clustering of homes around open space (Plaintiff's proposed golf course) and woods.

150. These new clustering provisions greatly burdened Plaintiff by imposing a substantial cost in time and money in attempting to satisfy the Town's new procedural requirements.

Other June 2004 zoning requirements

151. The new June 2004 zoning changes/amendments imposed other burdensome requirements as well.

152. Section 98-30 was substantially changed from how it appeared in the December 2003 ordinance. Now, in 2004, the zoning change imposed a 25 foot buffer from any federal wetland to the buildable 5000 square foot area for a house on each lot. It also required at least a 100 foot buffer from any stream high water mark to a house; and required that there be no disturbance within 50 feet of the high water mark of a stream. These changes necessitated reengineering the location of many lots and roads for

the bonus calculations, the PAC area and the clustered areas, requiring many months of engineering and additional meetings with the Planning Board and its consultants.

153. As a matter of basic fairness (as well as due process), no official or representative of the Town notified Plaintiff of the proposed new June 2004 zoning. Garling Associates did not inform Plaintiff of the impending zoning, even though Garling had meetings with Plaintiff and his MareBrook consultants on a regular basis, such as in connection with the creation of the revised DEIS.

154. Instead, the Town and Garling Associates let Plaintiff spend thousands of dollars working on his plans and MareBrook proposal so that he could meet the Town's new December 2003 zoning, only to change the rules again on him with further re-zoning in June 2004.

155. If Plaintiff had known that there would be further re-zoning, Plaintiff and his consultants would have either ceased work (so that they would not need to duplicate work after the enactment of new zoning), or Plaintiff could have sought to ask the Town Board not to change the zoning in a manner so detrimental to his MareBrook project and application.

156. Moreover, Plaintiff would have had an opportunity to address the environmental aspects of the zoning law changes if the Town had determined its proposed zoning to be environmentally significant (as it most certainly was) under SEQRA, rather than by issuing a NegDec regarding its Town law changes.

157. Sherman Expenditures: Sherman's costs in revising the DEIS from January 2004 through

June 1, 2004 were approximately $117,642. Sherman's costs in revising the DEIS from June 2004 through June 7, 2005, are approximately $130,727.

Impact of 2004 zoning requirements

158. Due to the burdens imposed by the new 2004 zoning, it took approximately 11 months (from June 2004 until May 2005) to again revise his application (again revising the DEIS and plans) to conform to the June 2004 zoning amendments.

159. During these eleven (11) months, Plaintiff worked diligently to comply with the Town's various demands by:

- Submitting a new DEIS in August of 2004;
- Drafting new maps for the yield plan in October of 2004; and
- Cooperating with Garling Associates and the Town Engineer, who gave Plaintiff new lists and changes to undertake, and almost continuously lists and demanded changes until May of 2005.

160. In May 2005, Plaintiff finally was able to put together the revised plans, maps, studies and, most importantly, a revised DEIS (which was satisfactory to the Planning Board).

161. This was achieved after suffering delays imposed by the Town Board's inaction on clustering and a PAC.

PAC & Clustering submission for Town Board approval

162. Plaintiff was successful before the Planning Board, because the Planning Board expressed approval by resolution for Plaintiffs MareBrook pro-

posal, which complied with its wishes as well as the express requirements of the Town's planner, Garling Associates.

163. In particular, as the Planning Board had Plaintiff's newly revised DEIS and Plans, the Planning Board passed a resolution, for Town Board approval, recommending Plaintiff s cluster plan for 143 homes built on one-half acre lots and his PAC. *See*, Planning Board Resolution of May 5, 2005.

164. The Town Board, however, refused to entertain Plaintiff's application as well as the Planning Board's resolution and recommendation.

165. In contrast, the Town Board held monthly meetings with Camp Monroe, a developer that was proposing a similar clustering of over 175 lots. Camp Monroe was allowed to "petition" the Town Board. The similarly situated Plaintiff Sherman was not.

166. The benefits of clustering are many. In particular, clustering is a favored residential land-use planning technique because it allows for reduced infrastructure and maintenance costs; less costs in municipal services; and more open space and preservation of natural resources and produces a better quality of life for its residents, at lower cost, with more open space and environmental protection. Because it is a favored device, with such community and municipal benefits, developers are often provided incentives to undertake clustering. Plaintiff was told that the Town was in favor of clustering residential units. The Planning Board members were strongly, and unanimously, in favor.

167. As to the PAC, Garling Associates encouraged this, as did the Town engineer and Supervisor Tully.

168. Supervisor Tully, for example, told Plaintiff that the PAC would be approved by the Town Board, that Plaintiff need not proceed with only ½ acre lots, and that he should incorporate the PAC into his MareBrook project.

169. As a consequence, Plaintiff had his consultants create plans that included clustering. Thus, it is inexplicable why the Town Board refused to favorably act, or act at all, on the Planning Board and Plaintiff's request that it approve Plaintiff's clustering.

Benefits of senior housing/PAC

170. The Town of Chester's 1974 and 2003 Master Plans both endorse the technique of clustering. In particular, the 2003 Master Plan made provisions for and encouraged senior housing.

171. As to a "PAC" becoming part of his MareBrook proposal, this was foisted upon Plaintiff by the representatives of the Town, including Supervisor Tully, whom informed Plaintiff that a PAC was what the Town wanted.

172. Under certain circumstances, "senior" communities, such as the "Planned Adult Community" that Plaintiff originally proposed, can be viewed very favorably. For example, a PAC does not generate school children, yet pays school taxes. Thus, a PAC reduces school taxes for the entire community.

173. Plaintiff's PAC, as per the DEIS, would have reduced Town taxes and school taxes for the community by 16%.

174. The Town should have examined these issues when it enacted and re-enacted zoning relating to Plaintiff's PAC (rather than issuing a NegDec).

175. Plaintiff's MareBrook was the only pending Town application which included a PAC.

176. Based upon the Planning Board being fully in support of his land-use proposal, Plaintiff saw no impediment to the Town Board granting him its authorizations for clustering and a PAC. Plaintiff should have received no opposition from the Town Board. These proposals were Master Plan-compliant, zoning-compliant, SEQRA-encouraged and fully harmonious with the character and nature of the community.

177. Thus, it is inexplicable why the Town Board refused to favorably act, or act at all, on the Planning Board and Plaintiffs request that it approve Plaintiffs PAC.

L. June 7, 2005 through February 2006

178. On June 7, 2005, the Town Board enacted yet another zoning law amendment affecting the MareBrook Project.

179. To Plaintiff's chagrin in June 2005, the Town had <u>again</u> revised its zoning to his detriment without the Town, its agents or representatives, Garling Associates, or the secretive "Zoning Committee," giving Plaintiff advance warning so that he could mitigate his losses or lobby the Town Board on his own behalf.

180. This was especially disconcerting as Garling Associates had worked for an entire year with Plaintiff and his MareBrook consultants in order to develop Plaintiff's revised DEIS and plans for the Planning Board.

181. This new June 2005 re-zoning affected his MareBrook proposal in the following ways.

a) First, almost all the work done from June 2004 through June 2005 would have to be done over as a result of the "new buildable lot" requirement.

b) Second, the zoning required additional changes to the site/subdivision plans, as well as to the DEIS; or, more specifically, the "Supplemental Draft Environmental Impact Statement (SDEIS)."

182. Between June 7, 2005 and February 2006, Plaintiff and his consultants again revised his application (now preparing a SDEIS—"supplement" to the existing DEIS) in order to conform to the new June 2005 zoning amendments. These new requirements included a buildable 5000 square foot box (where before the "footprint" could be any shape) of unrestricted land for a lot to have a house.

Town's "Collector Road" non-cooperation

183. In August 2005, the Town Board also demanded that the County support the PAC road onto the County road; and did not recognize the Town collector road that the zoning allowed.

184. Over a period of many months, the Town Board again refused to act, forcing MareBrook to change its application once more.

185. In particular, the Town's phraseology of the county recommendation for the PAC road to connect to the County road and its refusal to allow the PAC road onto the Town collector road seemed unreasonable and arbitrary.

186. However, the Town Board (i.e., Supervisor Tully) still demanded a letter from the county stating that it "liked" the plan. The County's answer was

that the Town collector road is the preferred design, but they could not prevent a roadway to the County road.

187. However, the County could not (and would not) appropriately say that it "liked" the PAC mad connecting to the County road.

188. Yet the Town Board, under Supervisor Tully's direction, administratively determined that Plaintiff needed to satisfy its demand that the County express its "liking" or preference regarding road access, rather than the Town Board acting based upon what was allowed or prohibited.

189. Consequently, Plaintiff was forced to abandon the PAC because he could not convince Orange County to "like" his proposed collector road access. Plaintiff replaced the PAC with single family, one-half acre lots "by right," in order to move forward on his MareBrook application.

190. If the Town had prepared an EIS regarding its new zoning (instead of NegDec'g it), this "collector mad" issue would have appropriately been discussed and evaluated as part of such review.

191. Between June 2005 and November 2005, Plaintiff also undertook the following:

- Authorized his engineer, and planner to revise the yield maps;
- Drew new plan designs and revised the DEIS; and
- Presented arguments before the Town board that his PAC proposal conforms to and meets all Town codes and regulations, including obtaining a letter from the Coun-

ty restating its position that he could build the road if he met the County's requirements (which he did by changing the plans).

192. In February 2006 Sherman began to revise his project, omitting the PAC.

M. New February 2006 zoning

193. It appears that the Town Board was again engaged in devising an intentional delay of Plaintiff's MareBrook application when it adopted a new zoning amendment in February 2006.

194. Once again, the Town Board's planner, Garling Associates, was preparing the new zoning, but without informing Plaintiff or the Planning Board.

195. The Town Board and its planner reasonably knew that such re-zoning would again nullify most or all of the work Plaintiff had done after its prior June 2005 zoning changes.

196. Among other things, the new zoning changed the buildable box of land without restrictions, from 25 feet deep to a minimum of 40 feet deep, sending Plaintiff "back to the drawing board."

197. Moreover, as Town Engineer McDonald acknowledged in his June 6, 2007 letter, the Town's re-zonings were always targeted at Plaintiff's application. Accordingly, Plaintiff was entitled to, but did not receive, actual notice of this proposed re-zoning.

198. Supervisor Tully was personally, politically and administratively involved in seeking to obstruct Plaintiff's MareBrook project. If Supervisor Tully prevented Plaintiff from developing MareBrook, it would remain wooded, pristine, and as a *de facto* nature preserve (partially adjacent to the State

Park). He would have received the political favor of many people in the Town, especially those residing near MareBrook.

N. March 2007 Re-Zoning

199. In March 2007, after many meetings with the Town Consultants and Planning Board, Plaintiff again submitted a DEIS and plans to the Planning Board, complying with the latest revised zoning regulations.

200. Again, the Garling Defendants did not inform Plaintiff about the new 2007 law, even though he was preparing a SDEIS at considerable expense and was working with the Garling Defendants and the Town engineer for a year on this revised application.

201. However, the Town Board changed the land use rules again in March 2007. It enacted new zoning/subdivision laws, changing the buildable area of a lot for density calculations. A lot must now have 1 acre of non-restricted land (no wetlands, steep slopes, etc) out of the 2 acres.

202. The 2006 law required that the subdivision have enough land to build a house on a 5,000 square foot area with a minimum 40 foot deep "box."

203. The new 2007 one-acre requirement basically eliminated the bonus density; and, since the Town Board has to approve a cluster, this new requirement also eliminated any reasonable application for clustering.

204. Based upon Plaintiffs experience with this Town to this point in time, it would be unreasonable for him to now spend additional hundreds of thousands of dollars engineering a project, only to have a

Town board use "unbridled discretion" to deny the project.

205. Plaintiff would have to again re-engineer the project, but without clustering, while redoing the DEIS.

206. After meeting with the Town consultants in June 2007, Plaintiff ascertained that new plans would have to be drawn for the density bonus and regular lots for the SR 2 district. To determine the new acceptable number of lots, new plans would have to be drawn for the entire project for the bonus density calculations. In addition, the cluster plan would then have to be revised, and a new DEIS would have to be created.

207. After this realization, Plaintiff stopped with his MareBrook application. It had become obvious to Plaintiff that the Town's goal was to financially exhaust him and to continue revising the clustering laws as a means of permanently defeating his MareBrook proposal, whereby MareBrook would remain as undeveloped, pristine woods, a nature preserve bought at Plaintiff's expense for the benefit of everyone else in the Town and the general public.

208. In other words, the Town had taken Plaintiff's property for public use without paying him just compensation since Plaintiff, not the general public, would bear the full cost of this desired public good of parkland/nature preserve.

209. Thus, by mid-2007, it appeared to Plaintiff that there would be no end to the Town's constant changes to its zoning ordinances, with each change necessitating a total revamping of his site plan maps, of his SEQRA-required studies and of his SDEIS as

well as a back-and-forth dialogue between Plaintiff and his consultants with the Town and its consultants.[8]

210. Specifically, in June of 2007, even the Planning Board's attorney stated that, with the new laws, he could not give an answer about whether additional parklands should be part of the yield calculation. Thus, Plaintiff could not reasonably continue his MareBrook proposal even if he desired to do so, as the Town Attorney was not giving Plaintiff an answer regarding the suggestion that Plaintiff provide additional parkland. Moreover, discussion of this issue could further delay the application's progress for months.

211. It became clear to Plaintiff that the Town was not acting in good faith; but, instead, was seeking to exhaust him financially with no intention of ever granting him a land use approval.

212. Specifically, the Town's recurrent changes in zoning appeared purposefully designed to require Plaintiff to start over whenever he was close to finalizing his site plans and SEQRA work for Planning Board approval. Plaintiff had become financially exhausted.

213. By March 2007, Plaintiff essentially had sunk the following funds into his MareBrook project, in rough numbers:

- $2,700,000 million purchase price;

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[8] Sherman Expenditures: Plaintiff's cost in revising the DEIS and plans for his MareBrook Project from January of 2006 through March 2007 was approximately **$103,837.00**.

- $500,000 plus in ongoing property taxes and municipal assessments; and
- $1,000,000 plus in subdivision and SEQRA work;
- In total, over $4,200,000 (plus several million dollars in interest in loans).

214. Yet, by March 2007, Plaintiff was essentially being told again by the Town to start over.

215. Plaintiff was like Dorothy in the Wizard of Oz, receiving ingenuous promises from the Wizard in the Land of Oz. Not only did he need another yield plan, engineered maps, and a revised DEIS, but the Town attorney did not even know if additional parklands should be part of the yield calculation. Plaintiff could not restart even if he wanted to do so since the Town's attorney could delay things for months.

216. Plaintiff's lenders were clamoring to be repaid. It was becoming impossible for him to find the money to pay his lenders, his consultants, and the Mare-Brook property taxes.

217. Since he had exhausted the funds appropriated for the project and the Town continued to constantly change its rules, Plaintiff had no other choice but to seek help from the courts.

O. May 2008 federal lawsuit

218. In May 2008, Plaintiff commenced a federal lawsuit, *Sherman v. Town of Chester et al*, 08 Civ. 4248.[9]

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[9] This federal lawsuit was voluntarily dismissed on January 6, 2012, and its claims re-filed in this State court within 30 days as permitted by 28 U.S.C. § 1367.

219. After the original complaint herein was filed, Plaintiff was hopeful that the Town would recognize that it had acted improperly and unreasonably toward him; and, then, fairly entertain and approve his MareBrook application.

220. However, discussion with the Town went nowhere.

221. Out of desperation, Plaintiff was able to "partner" with a business entity, whose representative attended a meeting with the Town Attorney, the new Town Supervisor (Mr. Stefan Neuhaus) and others.

222. From his clothing, physical appearance and grooming, the representative obviously was an observant, Orthodox Jew. Plaintiff believes his presence may have fed into the anti-Hassidic bias that affected the Town's decision-making as well as motivated its further wrongfully indifferent and grossly arbitrary actions toward him and his MareBrook project.

223. In November 2008, because talks with the Town were going nowhere, Plaintiff resubmitted his MareBrook application to the Planning Board with the support of his new partner.

224. In December 2008, he then resubmitted his SDEIS and plans for 238 lots to the Planning Board.

225. The Town's response was immediately antagonistic and retaliatory. Upon information and belief, this hostility was because Plaintiff petitioned the courts with a federal lawsuit, combined with the fact that his new financial partner was an Orthodox Jew.

P. December 2008—August 2009

226. In December 2008, Plaintiff resubmitted his SDEIS and plans for 238 lots to the Planning Board.

227. In January 2009, the Town engineer gave Plaintiff a list of corrections to the SDEIS, which included a demand for final designs of the water and sewer plants.

228. At this pre-preliminary approval stage, this was both an impossible requirement and a ridiculous demand. Specifically, the suggestion that Plaintiff should have prepared a set of "final designs of the water and sewer plants" is absurd, as final design for such facilities are never done until things, like location and the number of homes to be serviced, are determined; which, obviously, requires an actual subdivision plan first.

229. The Town engineer's demand for Plaintiff to prepare such a plan was arbitrary and abusive, which would have cost Plaintiff over $100,000 in order to prepare a plan for every revised cluster plan until an actual subdivision was approved by the Town.

230. In addition the Town engineer required analysis of projects located at the other end of the Town, miles from Plaintiff's project.

231. Upon information and belief, the Town engineer's abuse constituted reprisal for Plaintiff's exercise of his First Amendment right to petition his local government (the Planning Board) and the federal courts.

232. In addition, with the Town constantly revising the plans, Plaintiff could have spent more than $500,000 in redesigning plans.

233. Eventually, after 2 years arguing with the new Town engineer, the new Town engineer stated that the water and sewer plans should be submitted after

preliminary approval. The 2003 DEIS that was deemed complete by the engineer in 2003 only included sketch plans and some details of the water and sewer plans.

234. There was no bona fide purpose of demanding full plans. It was demanded solely to burden and oppress Plaintiff Sherman.

235. The Town's engineer eventually relented this contention, in 2011, after over a year of discussion and related billing.

236. The Town engineer also demanded that the DEIS and SDEIS be combined in Spring of 2009, which was not previously requested. As a matter of substance, this was a completely unnecessary demand. The demand appeared designed to a) impose more unnecessary expense upon Plaintiff; and b) create a financial benefit to the Town's consultants.

237. Then, the Town appointed a new Town engineer, effective on May 1, 2009.

238. Before the appointment, Plaintiff raised his concern that the appointment of a new engineer would delay the engineering review of his application. It would also increase the cost (to someone—either the Town or to Plaintiff), since a new engineer would obviously need to "get up to speed" on his MareBrook project, its status, and its history.

239. This act of appointing a new engineer was obviously done intentionally by the Town. Yet, there was no reason that it could not simply continue the services of its prior engineer, Mr. Gerald MacDonald, whom was familiar with his MareBrook project and its other Town-caused iterations.

240. Plaintiffs fear regarding costs became a reality. The Town began to bill Plaintiff for the new Town Engineer becoming familiar with his project and subdivision application.

241. Upon information and belief, Mr. MacDonald's dismissal as Town Engineer was a Town action that may have been taken in reprisal for Plaintiff's petition against the Town for redress (e.g., Plaintiff's federal lawsuit and his petitions to the Planning Board and Town Board) and for Mr. MacDonald's supportive June 6, 2007 letter, which described some of Plaintiffs' petitioning activity and the Town's repeated rezoning as a response.

242. Thus, it appears that Mr. MacDonald may have been retaliated against for supporting Plaintiff's petitions for redress.

243. After the new Town Engineer began his job, the Town billed Plaintiff for this new engineer's review of the entire MareBrook project. It is unreasonable, unjustified, and unauthorized for Plaintiff to be required to pay the Town twice for the same review and familiarization by its new engineer that its former engineer had been paid.

244. Moreover, the new engineer had an entirely new set of questions, concerns and items for Plaintiff to address, almost as if he was operating under a different set of "engineering rules." The Town expected Plaintiff to comply (even though, virtually, all the requests were unreasonable and unjustified and not part of the scope).

245. The Town also billed him for the engineer's "work" that was designed to abuse and oppress Plaintiff.

246. In August 2009, the Town changed its zoning again, eliminating the density bonus for clustering in apparent contradiction of the Town's own Master plan that encouraged clustering.

247. Plaintiff's MareBrook Project appears to be grandfathered, but based upon a history of bad faith, although such may not be the Town's view.

Q. September 2009—May 2010.

248. In September 2009, Plaintiff offered his revised subdivision proposal in two versions—one with 238 lots and another with 227 lots—to the Planning Board. Plaintiff also sought preliminary approval after a public hearing.

249. However, the Planning Board refused to put Plaintiff on its agenda from September through December 2009, denying him his right to a public hearing as well as his First Amendment rights.

250. Specifically, from September until December of 2009, Plaintiff was not allowed to appear before the Planning Board. When Plaintiff challenged the invoicing on or about December 2009 (which was the first time Plaintiff had seen the invoicing), and again thereafter regarding other Town invoicing for its consultants, the Town retaliated against Plaintiff by denying him the right to appear before the Planning Board for several months.

251. This was a further violation of his right to petition government.

252. This was a continuation of Defendant's strategy of obstructing Plaintiff from getting redress from the Town and its agencies, such as the Planning Board.

253. After Plaintiff's resubmission of his application in September 2009, Plaintiff discovered that the Town had replaced the Planning Board Chairman with Don Serotta, whom was openly hostile towards Plaintiff's MareBrook application as he had written letters to the Town in 2001 against his project.

254. Upon information and belief, Mr. Serotta did not have any prior experience on the Planning Board or in land use planning.

255. In the selection of Mr. Serotta and others, the Town filled positions on the Planning Board and Zoning Committee with people whom lived next to MareBrook and whom expressed hostility towards the project.

256. Plaintiff was eventually informed by Mr. Serotta that the reason that he was not allowed to appear before the Planning Board was (allegedly) because he had not paid consultant fees. The Town asserted, on December 4, 2009, that Plaintiff would not be placed upon the Planning Board agenda until he paid $25,000 in consulting fees.

257. However, the Town's rules provide that an applicant is entitled to receive consultant invoices and contest them to the Town Board within 15 days of receipt.

258. Plaintiff requested these invoices, but was not provided with them until February 2010. Although he questioned the invoices of the consultants, Plaintiff could not speak to the Planning Board directly about his concerns until he paid them the amount that these invoices reflected.

259. In this regard, the Town Code states, as to reimbursement of consultant's fees, as follows:

"**§ 48-3. Reimbursement of costs and expenses; escrow account; vouchers.**

A. The applicant for approval of any land use or land development proposal shall reimburse the Town for all of the Town's reasonable and necessary engineering, legal and planning fees and expenses incurred by the Town in connection with the review and/or approval of the application. Said fees and expenses are deemed application fees. Reimbursement shall be made in accordance with this article. For the purposes of this article, the term "land use or development" shall include, but not be limited to, a subdivision, lot line change, site plan, special permit, wetlands permit, variance, interpretation, appeal to the Zoning Board of Appeals, or any modification or amendment of any of the foregoing, and compliance with the State Environmental Quality Review Act (SEQR).

B. Initial planning and zoning review escrow deposits pursuant to the fee schedule established by this article shall be delivered to the Town Clerk as part of the original application submission.

C. No review shall be undertaken by the consultants, nor shall the matter be scheduled before the Planning Board, Zoning Board or Town Board until the initial escrow deposit, as set forth in this article or the incorporated fee schedule, is paid."

260. Noteworthy, the Town code references SEQRA regulation § 617, which provides that the applicant can still appear before the Planning Board if he or she is contesting such fees. Plaintiff was not allowed

to communicate with this governmental entity (the Planning Board) and exercise his First Amendment rights until he first paid the disputed and apparently unjustified fees.

261. Although he did not consider these fees to be fair or "roughly proportionate" to the Town's legitimate needs, Plaintiff paid the consultants fees of purportedly $25,000 in March of 2010 in order to communicate with and make requests of the Planning Board.

262. It was after the filing of an Amended Complaint in federal courts, on May 25, 2010 that Plaintiff was barred from returning or addressing the Town's Planning Board about these fees. A motivation appears to be reprisal for petitioning the federal court.

263. Plaintiff only was permitted to attend a workshop meeting before the Planning Board in April 2010. During this meeting, after a year of demanding full-blown designs for a MareBrook water plant and sewer plant, the Town engineer finally agreed that the water and sewer plant designs only were needed after preliminary approval.

264. Sherman Expenditures: For the period of August 2009 to April 2010, Plaintiff spent approximately $75,000.

265. After Plaintiff filed his federal lawsuit, the Town continued to act in bad faith and with the intent to obstruct.

266. However, instead of engaging in zoning changes as a means of obstruction., the Town obstructed Plaintiff bureaucratically by hiring new "technical" personnel (a traffic engineer and architect

on November 17, 2010 and a new planner in December 2010) who, as detailed below, then required new and unnecessary submissions and payment for duplicate review work, after the Town deemed the Draft Environmental Impact Statement Complete, on November 17, 2010.

267. As far as housing configuration, his current MareBrook application is not much different than what Plaintiff proposed in 2000, other than the missing recreational facilities. In fact, the homes of the new plan occupy more open space than the MareBrook proposal of 2003.

268. Significantly, the current proposal is much more "conventional" than his prior versions. It is a "by right" application—that is, the lot sizes comply with the "by right" provisions of the current zoning code.

269. Nevertheless, the Town obstructed in the following ways.

270. First, at the May 2010 meeting, the chairman of the Planning Board told the Town consultants to not give him anything in writing.

271. Second, after Plaintiff submitted his revised DEIS on June 1, 2010, the Chairman demanded an additional cluster plan for the conventional lots where the PAC was to be in the June 16, 2010 meeting. Consequently, this would require a reworking of his DEIS, engineering, and plans again.

272. Third, on September 1, 2010, the Planning Board voted to accept the DEIS as complete, and scheduled a public hearing for November 17, 2010 (where a traffic consultant and landscape architect showed up on behalf of the Town for the first time).

273. On December 14, 2010, the Town replaced Garling Associates with Ted Fink as the Town's planner. Mr. Fink then requested an additional traffic study regarding traffic on the other side of town (which Plaintiff and his consultants had long before completed, which had already been accepted and deemed complete by the Planning Board). Plaintiff and his consultants also submitted a draft Final Environmental Impact Statement (DFEIS).

274. At the January 5, 2011 Planning Board meeting, the new planner wanted to revise lot sizes and locations even though they had a 62 page set of plans that was already deemed complete by the Town. The new planner, however, demanded an environmental map, which took another month to complete at a cost of $8,000. Plaintiff and his consultants continued to receive new monthly lists from Mr. Fink, the new Town Planner, including demands for a wetland study, concerned species study, and constraints study (for which no changes were found in any of these studies that were completed in 2003). These studies were unnecessary and cost another $30,000 to $50,000. These studies had been deemed complete and acceptable 6 months earlier when the DEIS was deemed complete.

275. Mr. Fink also prepared a new list in May of 2011, requiring Plaintiff to redo the deemed complete DEIS and incorporate unnecessary material into the FEIS. This was work that had already been done and deemed complete. Thus, its completion unnecessarily increased Plaintiff's costs, which totaled over $260,000.

276. In July 2011, the Planning Board Chairman canceled Plaintiff's appearance at the Planning

Board's monthly meeting and demanded $40,000 in consultant fees before he could return.

277. On July 11, 2011, Plaintiff received an e-mail from Planning Board Chairman Serotta, stating that all roads had to be 24 feet wide instead of 30 feet, after the deemed complete action in November of 2010.

278. Once again, Plaintiff had to redraw new plans in order to relocate curbs, drainage, water and sewer mains, grading, etc., as well as modify the disturbance areas and related engineering. No explanation of these fees has yet been provided, and Plaintiff has lost 4 more months thereby to act.

279. In sum, for each of the sequential land use law changes, Plaintiff was required to address all regulatory changes relevant to his proposal, including reconfiguring lots, revising environmental analyses and impact statements, relocating water mains, sewer mains, roadways, and preparing new maps and plans, all at a cumulative cost that Plaintiff estimates exceeded half of a million dollars.

280. Since his DEIS resubmission in 2008, Plaintiff has expended over $350,000, and has spent over $60,000 in fees to the new planning consultant (Fink) when the old consultant (Darling Associates) only cost $20,000 to review the DEIS in 2003 and 2010.

281. The Town's regulatory land use controls, summarized above, were not for the purpose of legitimate land use regulation, but rather were designed to prevent Plaintiff from being able to use or develop his land.

282. Essentially, after over 10 years of effort, the Town has forced Plaintiff to modify his project from a

very attractive proposal of housing surrounding a golf course and other recreational facilities (fully consistent with the spirit and intent of the Town's 1974 and 2003 Master plans) to the present proposal of essentially conventional housing, for reasons that appear improper and discriminatory.

283. Upon information and belief, by refusing to consider Plaintiff's PAC request, the Town was violating its own policy, including favoring housing for semi-retired and retired families.

284. The Town's refusal to properly prepare its own EIS regarding its zoning law changes indicates its disregard for actually examining environmental issues and reveals that its true intent was singular—to stop Plaintiff from reasonably developing and using his MareBrook property.

285. By constantly changing the regulatory rules, the Town's strategy was to turn MareBrook into a *de facto* nature preserve without compensating Plaintiff.

S. Plaintiff's Article 78 Proceeding—November 10, 2011

286. To contest the Town's requirement that Plaintiff pay its unjustified consultant fees before entertaining his administrative appeal and moving forward on his MareBrook project, Plaintiff commenced a CPLR Article 78 Proceeding on November 10, 2011.

287. During this time, for a total of 11 months, Plaintiff was not allowed to appear before the Planning Board.

288. In addition, from December 2009 through October 2011, Plaintiff paid approximately $89,000

to the Town, as demanded, for its unreasonable consultant fees.

289. As a result, from December 2010 to October 2011, it cost Plaintiff approximately $446,000 due to the Town's abusive, arbitrary, unnecessarily expensive, consultant-directed process, which required Plaintiff to redo his formerly "deemed complete" DEIS (including maps) and to undertake other unnecessary actions, such as responding to every letter/comment the public made in connection with Plaintiff's November 2010 DEIS hearing.

T. Town's demands regarding FEIS illustrate abuse

290. The Defendant Town has acted arbitrarily and abusively regarding Plaintiff's EISs from 2000 through the present (January 2012).

291. Most recently, the Town has intentionally created obstacles to purposefully delay its processing of Plaintiff's Final Environmental Impact Statement ("FEIS") regarding his MareBrook application.

292. A hearing on the draft environmental impact statement ("DEIS") was conducted in November 2010. Therefore, a final EIS should and could have been ready for Town Planning Board review a short time thereafter.

293. Instead, the Planning Board insisted that Plaintiff essentially redo his entire DEIS, which had already been deemed complete previously.

294. The Planning Board also insisted that Plaintiff respond to unnecessary, trivial and often times patently absurd questions, for no justifiable environmental purpose and, apparently, solely to delay the project.

295. Examples of responses demanded by the Planning Board (and in particular by its Town Board-appointed planning consultant) include:

a) Determination of stream flow of a stream on Plaintiff's property (without specification of any issue of environmental concern);

b) Evaluation of a traffic intersection in the Town of Monroe, miles away;

c) Details of a wetlands walking trail crossing, which did not cross any wetlands;

d) Creation of a capital fund for water and sewer improvements, which is not Plaintiffs obligation;

e) Creation of a seed escrow account, which is not Plaintiff's obligation;

f) Analysis of water supply system maps, plans, and operating expenses, if the Town was to operate the water supply system (not Plaintiff's proposal);

g) Demands by the Town Planner for letters from the DEC and Wildlife Division before preliminary approval (which letters these agencies cannot provide since the MareBrook plans are constantly changing prior to preliminary approval);

h) Preparation of schematics for MareBrook to connect to the Harriman sewer plant, although MareBrook will have its own sewer plant upon approval by the Planning Board;

i) Studies of the feasibility of the proposed Tetz sewer plant on the other side of Town.

j) Separate answers to all inquiries by local residents after the hearing on Plaintiffs draft EIS, even if the questions were unrelated to any issue of environmental concern or already answered in his DEIS or draft FEIS.

This included answering every point in every letter, sometimes requiring an answer to be repeated 20 to 40 times, since quoting a previous answer was not allowed by the Planning Board (as directed by the Town's consultants). Some illustrative questions are as follows:

i. *Resident*: Will new homes find buyers?

ii. *Resident*: Will lots stay vacant?

iii. *Resident*: Drainage at Bull & Dug road, which is before the site?

iv. *Resident*: How will future actions by the Governor affect school taxes?

v. *Resident*: Who will police the snowmobiles and ATV's in the Goose Pond Park?

vi. *Resident*: allow dead trees to remain and replace lawns with multi-layered landscapes.

vii. *Resident*: If my well runs dry will town put in a new one?

viii. *Resident*: What happens to our property value if a new home is foreclosed?

ix. *Resident*: Safety of people entering the Goosepond Park entrance which is 2 miles from the site.

x. *Resident*: We don't like the billing times of the existing water company, how will it be fixed?

xi. *Resident*: Is the Town qualified to inspect the construction?

xii. *Resident*: What are the salaries and benefits of the municipal employees who will oversee the construction?

xiii. *Resident*: What style of homes will be built?

xiv. *Resident*: Will our mailing addresses change in Walton Lake Estates?

xv. *Resident*: Will the project use water from the Monroe Lake (miles away)

296. Plaintiff paid over $280,000, to date, to meet the Town's "requirements" regarding the FEIS. If he had not complied with the Town's demands, the Planning Board would not have proceeded further with his application. As a result, Plaintiff's only option would be to sue, with the project stopped, which would accomplish nothing for Plaintiff

297. In sum, the Town's demands, regarding finalization of the FEIS, were arbitrary, irrational, and unnecessary, unsupported by any requirement of the state environmental law (SEQRA) and designed to burden, delay and obstruct Plaintiff's MareBrook application.

Malicious and unlawful Town motivations

298. The Town decided, for reasons still not totally clear, that it would prefer to stifle and obstruct Plaintiff's MareBrook application, in order to prevent its use and development of MareBrook. It did so in callous disregard to the potential personal consequences to Plaintiff such as foreclosure and bankruptcy.

299. The Town's strategy was and is, essentially, to turn Plaintiffs land into a *de facto* nature preserve, which adjoins a state park, without paying Plaintiff any compensation for this taking of Plaintiff's property.

300. As a result of the Town's actions, Plaintiff has been:

a) Unable, for over a decade, to receive a preliminary approval on his initial subdivision application, or on any modifications, portions or changed re-submissions thereof;

b) denied the ability to apply for a minor subdivision;

c) denied a preliminary approval, which he should have received as of right in December 2003;

d) denied the ability to seek an administrative remedy (e.g., through the Town's Zoning Board of Appeals) because the Town consistently avoided rendering a final decision on Plaintiff's applications; and

e) denied the ability to seek a judicial remedy (e.g., through an Article 78 proceeding[10]) because the Town's tactic of repeated re-zonings prevented the Planning Board from issuing a decision on Plaintiff's land use application as Plaintiff was forced to devote time and finan-

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[10] Plaintiff alleged in his federal action, filed May 5, 2008, that the Town's tactic of repeatedly changing its zoning code has the effect of depriving him of all use and enjoyment and ownership interest in his real property.

cial resources to revising and changing his application to conform to the new zoning laws (of 2003, 2004, 2005, 2006 and 2007, and perhaps 2009).

301. As described above, the Defendant Town's actions, and that of its representatives, have prevented Plaintiff from realizing any return on his investment in MareBrook.

302. Plaintiff has been denied any and all economically viable use, enjoyment or sale of his real property through the Town's unreasonable and unjustified regulatory actions.

V. No "reviewable" municipality decisions

303. By constantly changing the subdivision approval criteria, Defendant Town avoided the issuance of any "final decision" on Plaintiff's MareBrook Project applications, thereby denying Plaintiff the ability to appeal to the Town's Zoning Board of Appeals or to State courts through a CPLR Article 78 proceeding or declaratory action about the Planning Board's disapproval.

304. This appears to be a calculated tactic by the Town, done under the belief that if it never gave Plaintiff the opportunity to make a challenge or appeal, that it could get away with obstructing his project.

305. It is unlikely that any local citizen is objecting to the Town stifling Plaintiff's progress because as long as Plaintiff cannot develop his land, the land remains unused and a park-like *de facto* nature preserve. However, if the townspeople wish to have a nature preserve, then the Town should purchase his property at a fair price. Otherwise, the Town has

no right to deny his right to use, reasonably develop and/or sell his land.

306. By never taking an "action," Plaintiff could not seek Article 78 relief regarding the obstruction of his subdivision application, and Plaintiff was been relegated to pursuing his rights under 42 U.S.C. § 1983, for which this State court has concurrent jurisdiction with the federal courts.

W. Evidence of anti-Semitic fear and animosity

307. The reckless indifference, disdain, intentional arbitrariness, non-transparency, and misrepresentations (affirmative or through silence, such as Garling Associates' silence towards Plaintiff while working on Town Board zone changes) strongly suggest that the Town's leadership has malicious and unlawful motives guiding its unreasonable conduct.

308. This motive, Plaintiff believes, is Town officials' (and their voting constituency's) fear that Plaintiff's 398 acre parcel could be transformed into another Hassidic Village, such as the Village of Kiryas Joel, located in walking distance from his MareBrook property.

309. Plaintiff is Jewish, born of Jewish parents and brought up with a Jewish heritage. Plaintiff practices the religion as a conservative. He is not ultra-Orthodox or Hassidic

310. At all relative times, his religious faith was known to some or all of the municipal Defendants, including the fact that he had a business and financing arrangement with a well-known developer, Mr. Israel Herskowitz, whom has developed land and built housing for Orthodox and Hassidic Jewish communities.

311. As a developer, many of his business dealings are with Jews. The Town's present and former supervisors and Town attorneys were aware of this.

312. As mentioned above, Plaintiff brought a representative of a potential investor with him to a meeting with Town officials. By his attire, it was clear to see that the representative is an Orthodox Jew.

313. In addition, Plaintiff has also found his MareBrook model home vandalized with a spray-painted, Nazi swastika.

314. It can be inferred from the facts that the Town was motivated to obstruct him because of anti-Semitism and the fear that his land may be used to incorporate a Jewish community.

315. Specifically, there is substantial circumstantial evidence that there was fear in the Town of Chester, and its elected officials, that a Kiryas Joel-style village might spring up out of the residential subdivision approval of his substantially-sized parcel of land.

316. Upon information and belief, the available evidence supports the reasonable inference that the Town's action and inaction regarding the MareBrook proposal is the result of anti-Semitism or fear of the installation of an Hasidic Jewish community.

317. The ultra-Orthodox, Hassidic Jewish village of Kiryas Joel is in walking distance (6 miles away); and has been, for quite some time, a source of angst among residents of neighboring municipalities.

318. Jewish municipalities, such as Kiryas Joel, in Orange County and Rockland County have caused concern for residents of these counties for many

reasons related to the ultra-Orthodox Jewish life-style and culture.

319. Plaintiffs observation is that in the suburbs of New York, many non-Jewish citizens appear very uncomfortable with, and even frightened by, the Hassidic culture and lifestyle.

320. It is common to hear comments that the ultra-Orthodox and Hassidic practice of having six or more children per couple will create burdens for the larger community; and articles about the Village of Kiryas Joel are often found in the newspapers, including articles about court cases involving the community's use (or abuse) of governmental services and municipal and school tax burdens.

321. In casual discussion, and at a Town Board meeting for a subdivision dubbed "Camp Monroe" adjoining his MareBrook project, Plaintiff heard local people express fear that allowing a subdivision approval with a sufficient number of houses could result in the sale to a number of Jews, such as the Hassidim, whom could then incorporate a village like Kiryas Joel (commonly referred to as the "KJ").

322. Upon information and belief, unlawful discrimination can be inferred from the Town's irregular regulatory activities affecting his property. This irregular Town action includes, but is not limited to:

- The Town's disregard for proper land-use policies (including the policies stated in its own land-use Master plan);
- Its singling out of his proposal for adverse treatment

- Its use of a secretive "Zoning Committee" without agenda, minutes, or notice of meetings;
- Its refusal to accept a "minor" (small parcel) subdivision application that he filed in December 2001, which were allowed under the terms of the Town's Moratorium;
- Its constant changing of land-use laws, rules, and regulations relevant to his property;
- Its undertaking of major zoning changes without first preparing and considering a Town-prepared EIS; and
- Its use of new consultants to repeat and redo a final DEIS, billing of Plaintiff for repetitive consultant work and refusal to allow Plaintiff to attend Planning Board meetings delaying the application more than 12 months in the last 2 years alone.

323. The above reflects improper hostility and animosity toward Plaintiff and his MareBrook Project.

324. Upon information and belief, it can be reasonably inferred that the Town and its land-use leaders harbored anti-Semitic biases and animosities regarding his MareBrook Project, including their fears that the ultra-Orthodox or Hassidic Jews might transform the proposed subdivision into "another KJ."

325. The record is clear that Plaintiff has been inordinately and unreasonably delayed as well as prevented from receiving subdivision approvals for the residential use of his property.

326. From the above, a reasonable fact-finder can infer illicit motivation for denying him the right to develop his real property.

X. Class of one

327. While Plaintiff was constantly stopped from developing his property, the Town previously approved large projects without hassle, numerous zoning changes, or new consultants.

328. For example, the following projects by other developers were approved:

- Windridge (approximately 240 homes clustered on 240 acres, or 1 per acre);
- Lake Hill Farms (approximately 150 homes clustered on 150 acres, or 1 per acre);
- The Greens of Chester (approximately 600 homes on a multi home site), for which the Planning Board has graciously accommodated for over 10 years;
- Surrey Meadows (approximately 200 homes);
- Lake Region Estates (over 100 homes); and
- Walton Lake Estate (over 100 homes).

329. Due to the Town's deliberate stalling of his MareBrook project, Plaintiff is asserting his vested right for a default approval.

330. Plaintiff requests that he be granted a default approval of this proposal as it existed in October 2003.

331. The costs from the beginning of the project (other than land purchase costs) through the DEIS/application being "deemed complete" by the

Planning Board in October 2003 were approximately $684,869.

332. Plaintiff would not have expended this huge sum had the Town's officials not led him to believe that it liked and would approve his MareBrook proposal. The above $684,869 includes some infrastructure (installation of wetland fencing) as well as the cost of his project's "model home."

333. Upon information and belief, the Town's regulatory land use controls summarized throughout this complaint were not for the purpose of legitimate land use regulation, but rather were designed to prevent him from being able to use or develop his land.

Y. Secret "final decision" of Town to obstruct Plaintiff indefinitely is ripe for judicial review

334. The Town has formulated and implemented an unannounced policy to obstruct and delay Plaintiff's MareBrook subdivision application in order to prevent Plaintiff from using and developing his land.

335. New York State law, upon information and belief, does not provide a compensation remedy for a regulatory taking such as that involved in this case, based upon current New York State Court of Appeals case law.

336. For example, Plaintiff has no remedy under the EDPL (because as a private citizen he cannot act as a condemnor).

337. Rather, Plaintiff's remedy in State court is through federal constitutional law and 42 U.S.C. § 1983.

338. Nevertheless, to the extent that there is a New York State remedy for the Defendant Town's regula-

tory taking of Plaintiffs real property, Plaintiffs seek such relief herein.

339. Accordingly, on October 4, 2011, Plaintiff filed a notice of claim with the Town; and was examined on this claim on November 30, 2011.

340. Defendant's intention to deprive Plaintiff of his property has never been expressly stated, nor has its intention to take his property as a *de facto* nature preserve without paying for such. Thus, the evidence supporting such intention is inferential; and it was not until mid-2011, and the Planning Board refusal to allow Plaintiff to appear even to dispute unjustifiable consultant fees, as well as with Defendant's abusive demands in the summer and fall of 2011 regarding Plaintiffs FEIS, that it became apparent to Plaintiff that the Town's intention was and is to permanently deprive Plaintiff of the use, development and profitable enjoyment of his property and of his labors.

341. Defendants' actions involve a municipal policy, pattern and practice to deny Plaintiff his constitutional rights, thereby entitling Plaintiff to damages relief under 42 U.S.C. § 1983.

Summary of Town's Regulatory Abuse

342. The Defendant Town imposed a Moratorium in 2001, with extensions beyond the legally allowed time period.

343. It enacted a new Master Plan in 2003, but, upon information and belief, did not prepare an environmental impact statement or generic environmental impact statement before doing so.

344. The Defendant Town revised its zoning code effective around December 24, 2003, which revisions

in large measure singled out Plaintiff's subdivision application for adverse treatment. This was done without informing Plaintiff of the pending re-zoning or "grandfathering" of Plaintiff's pending Planning Board application. The Town prepared no EIS before this enactment.

345. The Defendant Town nullified Plaintiff's subdivision application work performed prior to December 24, 2003, by failing to provide Plaintiff with a required hearing on his request for preliminary subdivision approval within 62 days after having accepted the application and deeming his DEIS "complete" (in mid-October 2003, although the deemed complete DEIS included conforming to the new 2003 master plan of the Town).

346. The Defendant Town, through its consultants (e.g., Garling Associates), misled Plaintiff into believing that Plaintiff would be granted subdivision approval after satisfying the requirements of the December 2003 zoning code, thereby dissuading Plaintiff from seeking legal redress at that time (for example, seeking the "default approval" of his application, to which he was entitled as a matter of right under N.Y.S. law[11]).

347. The Defendant Town secretly sabotaged Plaintiff's application, by drafting further amendments to the Town's land use regulations, thereby legislatively

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[11] See, Town Law § 276 (8). Plaintiff subsequently, after the federal action was commenced, requested that the Town Clerk issue a default approval, but has yet to receive a response (or a refusal) from the Town Clerk. Thus, no limitations period has begun on this point.

changing the Town's land use regulations again in 2004, to Plaintiffs substantial prejudice. These amendments were enacted in June 2004 (shortly before Plaintiff had reasonably expected to receive Planning Board preliminary approval. During this time, the Town's consultants, who were rewriting the zoning laws, were advising Plaintiff how to proceed forward with his application, without informing him of the proposed zoning amendments.

348. The Defendant Town repeated the above abusive tactics several times, such as tasking its planner, Garling Associates, to ascertain how Plaintiff's MareBrook application was proceeding, so that the Town could (without notice to Plaintiff) hinder and obstruct Plaintiff by:

- legislatively changing the Town's land use regulations again in 2005, to Plaintiffs substantial prejudice;
- failing to act in around the spring/summer of 2005, through its Town Board, on Plaintiffs request to be permitted to use a Town "collector road" or county road for access to the portion of the proposed MareBrook subdivision which contained the PAC;
- failing to act in the spring/summer of 2005, through its Town Board, on Plaintiff's request, related through the Planning Board's approval and recommendation, that Plaintiff's PAC and clustering proposals be accepted by the Town Board;
- legislatively changing the Town's land use regulations again in 2006, to Plaintiff's substantial prejudice;

- legislatively changing the Town's land use regulations again in 2007, to Plaintiff's substantial prejudice; and
- legislatively changing the Town's land use regulations again in 2009, potentially to Plaintiffs substantial prejudice.

349. As to the above land use law changes, the Town prepared no EIS, generic EIS, or supplemental EIS before this enactment.

350. The Defendant Town imposed unnecessary, duplicate and absurd administrative requirements upon Plaintiff in 2009, 2010 and 2011, all to Plaintiffs substantial prejudice, including requiring Plaintiff to:

- redo his project's Draft EIS ("DEIS") after it had previously been deemed complete;
- unnecessarily redo, revise and update various reports, investigations and engineering by Plaintiffs consultants from March through November of 2011, which are still ongoing; and
- pay fees for unnecessary, unauthorized excessive and duplicative work by Town consultants without a reasonable means for redress or appeal (which issue is still ongoing in an Article 78 Petition filed in November 2011, Orange County Index No. 010376/2011).

351. The above conduct by the Town has deprived Plaintiff of all use and enjoyment of his land for the period 2001 to present, including, but not limited to, destroying his ability to sell portions of his residentially-zoned property for residential housing, or to

otherwise subdivide or use his real MareBrook property, by preventing him from subdividing the property in any manner.

352. The Town's actions have also deprived Plaintiff of his labors and work as a developer and, thus, his liberty interest in his occupation as a developer or real property, in violation of his due process rights.

353. When Plaintiff purchased his MareBrook property in 2001, he reasonably believed and reasonably expected that he would be able to obtain subdivision approval for his MareBrook project.

354. Thereafter, Plaintiff continued to reasonably believe and expect that his initial investment of $2,700,000, and his additional investment of time and over $2,000,000 in money in pursuit of a subdivision approval, was not time and money wasted.

355. Plaintiff purchased MareBrook in order to create a reasonable residential development with pleasant and environmentally sound recreational facilities, including a golf course.

356. Based upon the state of affairs as they existed on and after 2000, there was no economically viable use for Plaintiff's land as it was zoned, except residential development such as that proposed by Plaintiff, either with or without the recreational amenities.

357. Upon information and belief, from a historical point of view, the MareBrook land was formerly agricultural. However, it has not been used for any agricultural use in recent times; and farming is not a viable economic use for real property in this region of New York State, and this area of Orange County.

358. The Town's zoning of the MareBrook land, at of the date of Plaintiff s purchase, was for less intensive land use than commercial or industrial use.

359. There were no residential or commercial structures or business activities located upon Plaintiff's land, or any agricultural or any other profit-making activity at the time of Plaintiffs purchase; and, therefore, no means available for Plaintiff to productively use his land to produce income or otherwise use his land for financial gain.

360. Between the period of 2000 and present (January 2012), Plaintiff spent the following roughly approximate amounts of money (as well as his corresponding amount of personal time):

a) $2,700,000 for the purchase of the MareBrook property in 2000-2001;

b) followed by approximately $684,000 spent for the planning, engineering, design, environmental and other technical services in responding to the Town's 2001 zoning moratorium; and, thereafter, working further on the application and final presentation of a "deemed complete" application to the Town's Planning Board in October 2003;

c) followed by approximately $117,000 spent for planning, engineering, design, environmental and other technical services work performed in responding to the Town's new December 24, 2003 zoning ordinance;

d) followed by approximately $130,000 spent for planning, engineering, design, environmental and other technical services

work performed in responding to the Town's new June 2004 zoning ordinance;

e) followed by approximately $111,000 spent for planning, engineering, design, environmental and other technical services work performed in responding to the Town's new July 2005 zoning ordinance;

f) followed by approximately $103,000 spent for planning, engineering, design, environmental and other technical services work performed in responding to the Town's new February 2006 zoning ordinance;

g) followed by approximately $122,000 spent for planning, engineering, design, environmental and other technical services work performed in responding to the Town's new March 2007 zoning ordinance;

h) followed by Plaintiffs federal lawsuit in 2008, seeking a remedy for the Town's regulatory abuse of Plaintiff's rights through its above-mentioned rezoning (and other regulatory abuse); and

i) followed by approximately $388,000 spent in resuming his application in 2008, which expenses were increased greatly due to the Town's regulatory abuse in 2009-2011 in the form of creating unreasonable and unjustified "technical" and administrative obstacles delaying the processing of Plaintiff's MareBrook application (e.g., requiring "final" drawings and plans for a water plant and sewer treatment facility, which request

was absurd at the preliminary subdivision approval stage); as well as

j) prohibiting Plaintiff from appearing before the Planning Board for a period of 7 months without a stated or justified reason; and

k) billing Plaintiff for over $80,000 in unjustified, unauthorized and duplicative consultant fees for work allegedly performed by the Town's consultants.[12]

Z. Damages

361. Plaintiff has not been allowed to productively use or develop his property during the whole application process for over 10 years.

362. As a consequence of the Town's abuse of its regulatory powers, through the enactment of sequential zoning laws, and its administration of the Planning Board process through unreasonable technical requirements, wrongful financial exactions and undue and unjustified delays, the Town has financially exhausted Plaintiff, to the point of facing foreclosure and possible personal bankruptcy. Plaintiff has lost almost his life-long savings in seeking to reasonably use and develop his MareBrook land.

363. As a result of the Town's obstruction of Plaintiff's attempts to use and develop his real estate, Plaintiff has been the subject of foreclosure proceedings. Due to economic necessity, Plaintiff has been

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[12] This consultant fee issue is the subject of an Article 78 petition pending in this court. *See*, Matter of Sherman, Index # 010376/2011 (Orange Sup. Ct.)(Woods, J., A.J.S.C.).

forced to contract away the majority of his economic interest in MareBrook to lenders and investment partners; and one of his lenders, TD Bank, has obtained a personal judgment against Plaintiff in the sum of $4 million. Collection action against Plaintiffs personal assets is an obvious possibility.

364. Plaintiff has lost 80% or more of his equity and ownership share of MareBrook to bring in investors.

365. Plaintiff has lost two contracts for the sale of the property (sale of existing tax lots), which has caused him great financial damage and loss in profit.

366. Plaintiff was been damaged by being required to pay the Town's consultants, especially its engineers, for unnecessary work; the predominant portion of which would have been unnecessary absent the unlawful motivations and actions of the Defendants herein.

367. A summary of Plaintiffs costs is reproduced below:

- Cumulative Taxes paid (through 2010): $700,000
- Cumulative Interest Charges & Carrying Costs: $3,000,000
- Yearly Expenses: $1,872,000
- Original Purchasing Price: $2,700,000
- Total Cost: $8,272,000

368. Thus, Plaintiff has lost most of his financial investment in MareBrook.

369. Defendants' actions have also deprived Plaintiff of his liberty interest in pursuing his livelihood as a developer.

370. Thus, Plaintiff has been severely damaged by the Town's unlawful and abusive actions herein.

FIRST CAUSE OF ACTION— DENIAL OF, AND REPRISAL FOR EXERCISING, PLAINTIFF'S FIRST AMENDMENT RIGHTS, INCLUDING RIGHT TO PETITION, AND FREEDOM OF RELIGION

(U.S. Constit., amend I)

371. Plaintiff hereby repeats and realleges each allegation contained in the paragraphs above as if fully set forth again here at length.

A. Religion & Association

372. Upon information and belief, Plaintiff's Jewish religion, his association with Jewish businessmen and lenders, and the fear and perception that Plaintiff may sell MareBrook housing to Jews (and perhaps ultra-Orthodox or Hasidic Jews), resulted in the unlawful and discriminatory actions obstructing Plaintiff's MareBrook Project described in this complaint, and reprisal for Plaintiff's business affiliation and potential sale of real estate to people of the Jewish faith, including but not limited to Orthodox or Hasidic Jews.

373. Plaintiffs right to exercise his religion, and to associate with people who are Orthodox or Hasidic Jews, and to potentially sell land or housing to such individuals, has been infringed.

B. Denial of right to petition

374. The First Amendment guarantees the right to petition government for the redress of wrongs.

375. Plaintiff has sought to petition the Defendant Town for the redress of wrongs regarding his Mare-Brook application, but has been denied such right to petition.

376. Upon information and belief, the "right to petition" can be viewed as the reciprocal to procedural due process. Due process requires giving notice to a person and an opportunity to be heard, thereby hopefully avoiding the creation of a grievance.

377. The right to petition involves the citizen to provide notice to the government of a deprivation or grievance, and to seek the government's redress.

378. Here, the Town did not provide Plaintiff with notice of its motivations and intention to obstruct his land use applications to it, thus depriving Plaintiff of due process (Third Cause of Action). As a consequence, the Town created a deprivation and grievance for which Plaintiff was entitled to seek redress, from the Town, under the right to petition guarantee of the First Amendment.

379. Land use applications are a form of petition to government.

380. The Defendant Town has refused to receive and consider Plaintiff's petitions to the Town (his MareBrook application, in its evolving forms).

381. Upon information and belief, Plaintiffs land use applications were not considered by the Town because it kept changing its zoning ordinances to avoid the need to address the merits of Plaintiffs land use applications.

382. Another form of petition is simply being allowed to address a Town agency—such as the Plan-

ning Board—regarding matters pending before such a body.

383. In this regard, Plaintiff sought for many months, during 2009, 2010, and 2011, to be allowed on the Planning Board agenda so that he could be heard and have his subdivision application considered. The Planning Board has refused to allow him on its agenda, or appear otherwise.

384. It has done so arbitrarily and in violation of law, upon the purported grounds that Plaintiff must pay Town consultant fees, even though such fees are in dispute. Thus, the Town, through its Planning Board, has denied Plaintiff his right to petition.

385. Finally, Plaintiff exercised his right to petition by commencing litigation against the Town in 2002, regarding the moratorium, and in federal court in 2008, and with an amended complaint in 2010, regarding the regulatory abuse and constant rezoning described herein.

386. As a result of his petitions to the courts, Plaintiff suffered reprisal.

387. Plaintiff will be further denied the right to petition if this Court does not provide a remedy for the governmental action described herein, which has prevented Plaintiff from using, developing and selling his real property; taken his labor as a developer; and has ruined Plaintiff financially.

388. Plaintiff has been injured thereby.

389. This claim is actionable under 42 U.S.C. § 1983.

SECOND CAUSE OF ACTION— REGULATORY TAKING OF PLAINTIFF'S REAL PROPERTY, AND DENIAL OF HIS PROPERTY INTEREST IN USING, ENJOYING AND SELLING HIS REAL PROPERTY

(U.S. Constit., amends. V, XIV)

365. Plaintiff hereby repeats and re-alleges each allegation contained in the paragraphs above as if fully set forth again here at length.

A. No Rational Basis for Towns Regulatory Actions

366. The Town's techniques and methods of land use regulation, including constant rezoning and land use enactments (which do not substantially support the Town's master plan), and the Town's arbitrary and capricious administrative requirements imposed by financially self-interested consultants, constitute irrational regulation, which does not support a valid public purpose.

367. The Defendant Town's 2001 land use moratorium, and subsequent changes to the Town's zoning and land use laws, regulations and the Town's interpretations thereof, were not designed to, and did not, substantially advance legitimate State or Town interests, and lack rational basis.

368. In fact, Defendant's zoning changes, upon information and belief, run against the master plan and comprehensive plans.

i. "Reverse Spot Zoning" & Town's ignoring SEQRA

369. Moreover, regulatory actions taken to prevent residential development in an area zoned for residential development, in order to maintain a a *de facto*

nature preserve, constitute "reverse spot zoning" and, for this additional reason, are irrational governmental action.

370. The zoning actions of Defendants were intentionally directed at Plaintiff to single him out and to discriminate against his MareBrook Project subdivision proposal.

371. Defendant's actions constituted unlawful "reverse spot zoning" as they were designed to impermissibly prevent Plaintiff's legitimate and reasonable proposed use and development of his MareBrook land (which proposed use was fully in conformity with the 1974 and 2003 Master Plans) and, by implementing zoning there under, to create a *de facto* "nature preserve zone" limited to Plaintiffs MareBrook land.

372. The Town was required to prepare its own EIS (generic, supplemental or otherwise) when its revised land use ordinance(s) had the potential for significantly affecting the environment, but failed to do so.

B. Per Se Regulatory Taking of Plaintiff's Property, by Denying All Use and Benefit

373. The Town's actions herein have deprived Plaintiff of all use and enjoyment of his real property, including, but not limited to, the right to develop and sell any portion of such property; thus constituting a *per se* regulatory taking of Plaintiffs property.

374. The Town's actions in denying Plaintiff of all use, enjoyment and benefit of his real property amounts to a categorical taking of Plaintiffs real property by the Town.

C. Penn Central Balancing

375. The Town's regulatory actions taken herein, to the present, are supported by little, if any, valid public purpose, whereas the burden imposed upon Plaintiff has been oppressive and devastating; thus constituting a regulatory taking of his property without just compensation under the teachings of the US Supreme Court in *Penn Central. See, Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).*

376. The Town's land use law changes were not of environmental significance, as indicated by the Town's own declarations of environmental non-significance, in the form of Negative Declarations ("NegDec's) under SEQRA.

377. The Town's land use law changes were then used by the Town to impose oppressive regulatory burdens upon Plaintiff, preventing him from using, developing and enjoying his property and destroying him financially.

378. In balancing the Town's legitimate (minimal, if any) interest against the legitimate interests of the property owner, the balance clearly indicates that the Town has taken Plaintiffs real property.

379. By constantly and unreasonably changing its land use laws, continuing to this day, the Defendant Town has deprived Plaintiff of all economically viable use of his land on a temporary and permanent basis.

380. Upon information and belief, the individual Defendants were aware that their conduct violated, and was designed to violate, Plaintiff's federal civil rights.

381. Upon information and belief, the law in this field of jurisprudence is long established, and the Defendants' actions reflect official municipal policy and practice.

D. De facto intrusion upon MareBrook

382. Upon information and belief, the Defendant Town's actions essentially amounted to the creation of open space and visual easements for the benefit of MareBrook's neighbors and others in the Town.

383. Upon information and belief, this amounted to a *de facto* invasion of Plaintiffs property, and the taking of land, and the property interest of visual easements and easements to light and air, for the benefit of MareBrook's neighbors and the townspeople.

384. This constitutes the *per se* taking of Plaintiff's real property without due process or the payment of just compensation.

385. Upon information and belief, the indefinite, and potentially permanent, keeping of Plaintiff's lands in an undeveloped, semi-forested state, thereby allowing it to be sown with tree seeds from neighboring property, is not materially different from being permanently flooded with water; and also constitutes an actionable invasion of property by the action of the Town and a further actionable taking of Plaintiff's property.

386. Upon information and belief, Defendants' governmental actions and governmental processes created an extraordinary delay regarding his right to use and subdivide his property, thereby destroying the "incidents of ownership," to which Plaintiff is entitled under the Fifth and Fourteenth Amend-

ments, and "taking" his property without due process or just compensation.

387. Upon information and belief, through their actions, Defendants have perpetrated both an actual regulatory and *de facto* regulatory taking of Plaintiff's property, and an actual or *de facto* invasion of his property, on the pretext of acting within the Town's police powers.

388. Upon information and belief, the Town's constant re-zonings, affecting MareBrook, cumulatively created a local regulatory scheme that violated the teachings of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922), namely, that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

389. Moreover, under the teachings of *Penn Central* and subsequent cases, the Town's actions have so frustrated distinct investment-backed expectations as to amount to a taking of property when considering factors such as:

- the economic impact on the Plaintiff of the challenged rule, regulation or statute;
- the extent to which the regulation interferes with investment-backed expectations; and
- the nature of the challenged action.

390. Moreover, the Supreme Court has affirmed, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), that it is a question for a jury whether a developer has been denied all economically viable use of property and whether (after repeatedly imposing more rigorous demands) a

municipality's denial of the developer's proposal substantially advances legitimate public interests.

E. Vested rights; special facts; equitable estoppel

391. Through Defendants actions, it has sought to prevent Plaintiff from exercising the vested rights that he has obtained (by law and/or equity) as well as subdividing and developing his property.

392. Alternatively, Defendants have, through intent or negligence, improperly delayed Plaintiff's ability to obtain a "vested" property interest in his MareBrook application.

393. Upon information and belief, Defendant is liable to Plaintiff under the "special facts" exception, and also as a matter of equitable estoppel.

394. Plaintiff has been damaged thereby.

THIRD CAUSE OF ACTION— DENIAL OF SUBSTANTIVE DUE PROCESS OF LAW, AND PLAINTIFF'S LIBERTY INTEREST TO PURSUE AND ENGAGE IN A LAWFUL OCCUPATION AS A DEVELOPER
(U.S. Constit., amend. XIV)

394. Plaintiff hereby repeats and realleges each allegation contained in the paragraphs above as if fully set forth again here at length.

A. Arbitrary and irrational regulation of Plaintiff's land

395. Through Defendants' actions herein, Plaintiff has been deprived of due process of law, including, but not limited to, being deprived of his right to reasonably use and develop his real property; and

being deprived of his investment-backed expectations regarding the permissible use and development of his real property.

396. Upon information and belief, there was no legitimate basis for denying Plaintiffs MareBrook subdivision application, or to continually rezone his MareBrook property, upon any legitimate health, safety or public welfare basis.

397. Plaintiff committed substantial assets to the development of his real property in accordance with his MareBrook Project application(s) to the Town, and also undertook improvement as allowed by Town regulation, e.g., infrastructure development, including road clearing work, erosion control, and the construction of a model home, thereby further demonstrating his reasonable expectation of an entitlement to develop his land.

398. Upon information and belief, Defendant's denial of permission for Plaintiff to develop his real property has been improperly and maliciously motivated, involving an intentional, long-term plan to deprive Plaintiff of his ability to reasonably use, and subdivide, his land in an economically viable manner.

399. Plaintiff has satisfied the two-prong test for establishing a substantive due process claim since: 1) he had a valid property interest entitled to constitutional protection at the interest, and 2) the deprivation of the valid property interest was so outrageously arbitrary as to be a gross abuse of governmental authority.

400. Here, Plaintiff had a valid property interest in using and enjoying, and reasonably selling, his MareBrook land.

401. Through constant rezoning and other shenanigans (e.g., administrative and bureaucratic obstacle-creations), Plaintiff has been deprived of any and all use or benefit of his real property.

402. In addition, the method and manner of Defendant's action is "so outrageously arbitrary as to be a gross abuse of governmental authority."

403. Defendant's conduct is also malicious and improperly motivated as set forth in Plaintiffs equal protection claims, *infra*, and other claims for relief.

404. As a result of the Town's actions, Plaintiff has lost his initial investment, lost his subsequent personal investments into his MareBrook project, has suffered foreclosure actions being filed against him, greater claims, a personal judgment against him of $4 million by his lender, suffered the loss of credit, the potential for collection action, and has anxiety and emotional distress caused by the financial problems created by the Town's actions

B. Liberty Interest in an Occupation

405. Plaintiff has liberty interest in being able to pursue an occupation of his choice; and he has chosen an occupation as a land developer.

406. Through the arbitrary, capricious and unlawful actions of the Town, Plaintiff has been deprived of over 10 years of individual effort as a developer seeking to use and develop, and profitably sell, his real property.

407. As a real estate developer, Plaintiff had a legitimate claim of entitlement to lawfully pursue his

chosen occupation, and not to be obstructed through arbitrary governmental action.

408. Through its actions, therefore, the Town has deprived Plaintiff of his liberty interest in a gainful occupation without due process of law.

409. Plaintiff has been damaged thereby.

FOURTH CAUSE OF ACTION— DENIAL OF PROCEDURAL DUE PROCESS OF LAW

(U.S. Constit., amend. XIV)

410. Plaintiff hereby repeats and realleges each allegation contained in the paragraphs above as if fully set forth again here at length.

411. Upon information and belief, Plaintiff had various constitutionally-protected property and liberty rights concerning his real property, including the right to reasonably use his real property, to rely upon the legitimacy of local governmental regulatory action (e.g., that land use regulations will, for example, be consistent with the policies contained in a master plan), and to be afforded notice, and an opportunity to be heard, regarding governmental action which will burden his property rights or stigmatize his property.

412. Upon information and belief, Defendants have created a municipality policy, pattern and practice that Plaintiff will not be permitted to subdivide his property.

413. Upon information and belief, this municipal policy, whether intentional or *de facto*, has stigmatized Plaintiffs real property and thereby infringed upon Plaintiffs liberty interests within the meaning

of the due process clause of the Fourteenth Amendment

414. Upon information and belief, the Town's regulatory actions (e.g., repeated land use law changes directly resulting from the progress of Plaintiffs application) were aimed and targeted specifically at Plaintiff

415. Therefore, Defendant local government was required to provide, but has failed to provide, Plaintiff with basic due process procedures—notice and an opportunity to be heard—regarding its actions intended to prevent him from using and developing his real property.

416. In this regard, upon information and belief, the Defendant Town and Defendant Supervisor Tully have:

- failed to apprise Plaintiff of their intentions regarding his real property (including their secret agenda and intention to obstruct any and all development);
- failed to provide Plaintiff with notice of, and an opportunity to respond to, Defendants' (impermissible) grounds for obstructing Plaintiff's proposal;
- failed to provide Plaintiff with notice of governmental meetings (e.g. Town Board and its "Zoning Committee") proposing governmental action (e.g., rezoning) specifically affecting Plaintiff's real property and land use proposals.

417. Upon information and belief, Plaintiff was entitled to actual notice of the new zoning(s), especially zoning directly affecting (and designed to affect) his project, yet was given no actual notice(s).

418. Thus, Defendants have deprived Plaintiff of procedural due process of law.

419. Plaintiff was damaged thereby.

FIFTH CAUSE OF ACTION— DENIAL OF EQUAL PROTECTION OF THE LAW

(U.S. Constit., amend XIV and 42 USC section 1981)

420. Plaintiff hereby repeats and realleges each allegation contained in the paragraphs above as if fully set forth again here at length.

421. Upon information and belief, Plaintiff Sherman has been denied equal protection of the law.

A. Disparate treatment as a Jewish developer

422. Upon information and belief, Plaintiff was not treated in the same manner as similarly and/or identically situated applicants, for reasons completely arbitrary, irrational and without basis in legitimate land use planning or justifiable regulation.

423. Upon information and belief, the Town's *ad hoc* and extra-legal "illegal Zoning Committee" was composed almost entirely of biased, non-disinterested members, each of whom resided adjacent to, or within a quarter mile of, MareBrook, and whom were personally opposed to the MareBrook Project.

424. Upon information and belief, the Town's various zoning law amendments were sought and/or influenced by these biased, non-disinterested illegal

Zoning Committee members, which singled out Plaintiffs MareBrook Project for adverse treatment.

425. Upon information and belief, a reasonable inference can be made that Plaintiff was singled out for disparate treatment because of the fact that Plaintiff is Jewish, has Jewish business Associates, has an Orthodox Jewish lender, has Orthodox Jewish business partners, and has the potential for selling enough units of housing so that the new residents could form a village such as the Orthodox community of Kiryas Joel.

426. Upon information and belief, this prospect, although not based upon reality concerning the possibility of a Jewish village, is so frightening to some members of the local community, and to town politicians, that Plaintiff has been treated obstructed development of his land as described above.

B. Interference with Contract due to Religious/Race discrimination resulting from anti-Semitism

427. A motivation for denying Plaintiff the ability to develop MareBrook is the fear that Plaintiff (who is Jewish) and his various business associates or potential associates and/or lenders (who are also Jewish), might sell MareBrook housing to Orthodox Jews or Hassidic Jews.

428. Upon information and belief, some of the local citizenry, and the Town's political leadership (including Defendant Tully) were fearful that allowing MareHrook to be subdivided for residential housing would risk the creation of "another Kiryas Joel" style Hassidic village.

429. The Town's denial of Plaintiff's ability to use and subdivide his real property, based upon the fear that he might sell housing to Jews (Orthodox, Hassidic or otherwise), violated his right to the equal protection of the law and constituted both religious and race discrimination.[13]

430. Defendants' actions are discriminatory, and taken under color of law.

431. Defendants' actions are in violation of 42 U.S.C. § 1981, which states in relevant part that:

> "*(a) Statement of equal rights*
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, ... and to the full and equal benefit of all laws and proceedings for the security of ... property as is enjoyed by white citizens....
>
> *(c) Protection against impairment*
>
> The rights protected by this section are protected against impairment by ... impairment under color of State law.

432. Defendants have intentionally denied Plaintiff the equal benefit of the law, denied security as to his real and personal property, and impaired Plaintiff's ability to contract with other Jews to sell housing.

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[13] At the time of the ratification of the Fourteenth Amendment, Jews were viewed as a race. *See, e.g., Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987). People who are Jewish are protected by 42 U.S.C. § 1981, under the Supreme Court's teachings in *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) *and Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987).

C. Unlawful exclusionary zoning based upon religion

433. Upon information and belief, the Town's land use regulation and practices—including the practices engaged in regarding the MareBrook project—were designed to, and have the effect and impact of, creating a socioeconomic separation of classes in the Town through a scheme of restricted housing (or in lieu thereof, denying Plaintiff any subdivision at all).

434. Upon information and belief, this is unconstitutional as exclusionary zoning under the principles set forth in *Berenson v. the Town of New Castle*, 38 N.Y.2d 102 (1975) and *Continental Building Company v. Town of North Salem*, 211 A.D.2d 88 (3d Dep't. 1995), *app. dism'd, lv. den.*, 86 N.Y.2d 818 (1995), as it does not provide a properly balanced and well-ordered plan for the Town and ignores the established regional need for multifamily and affordable housing in Orange County.

D. "Class of One" equal protection violation

435. Upon information and belief, the Defendant Town and its officials disparately treated and singled out Plaintiff for adverse treatment regarding his MareBrook Project.

436. The Defendants thereby denied Plaintiff the equal protection of the law, actionable under the U.S. Supreme Court's "class of one" jurisprudence even if no suspect class discrimination, such as religious discrimination, is established herein.

437. In particular, on numerous occasions, the Defendant Town has treated Plaintiff in a manner distinctly different from other owners and developers of real property in the Town.

438. For example, the Defendant Town singled out Plaintiff when it stopped his MareBrook application's progress via a moratorium; and when it allowed him to proceed with his application and create a "deemed complete" DEIS 2003, but then refused to allow Plaintiff a hearing on his application for preliminary approval (as required by state law) by repeatedly changing the Town's local land use law in December 2003, June 2004, 2005, 2006, 2007 and 2009.

439. The Defendant Town also singled Plaintiff out for the imposition of excessive, unwarranted and unjustified consultant fees costs, and for exclusion from the Planning Board's agenda without justifiable cause, thereby preventing him from proceeding forward with his application in 2009 and 2010 and continuing up til and including September 2011.

440. The Town has engaged in the tactic of requiring a "perfect," comprehensive and all-encompassing FEIS from Plaintiff, causing Plaintiff exorbitant cost and excessive delay, without justification under state or local environmental or land use law. Essentially, the Defendant Town has required Plaintiff to answer every question by every resident in the Town pertaining to his application, though not requiring other developers or property owners to be so burdened when seeking Planning Board approvals.

441. The Defendant Town's repeated and ongoing adverse treatment towards Plaintiff has singled him out for abusively arbitrary and unfair treatment, with the apparent intent of preventing him from developing his 398 acres of real property and destroying him financially, so that the Town can create a *de facto* nature preserve out of his property, adjoin-

ing a State Park, without compensating him for the damage caused to him.

442. The Town's conduct towards Plaintiff has been so abusive and patently arbitrary as to shock the conscience.

443. Plaintiff has been damaged thereby.

SIXTH CAUSE OF ACTION— VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE N.Y.S. CONSTITUTION

444. Plaintiff repeats and reiterates the above allegations as if fully set forth here at length.

445. Defendant has deprived Plaintiff of the equal protection of the law, in violation of the Constitution of the State of New York.

446. Under the teachings of *Brown v. State*,[14] Plaintiff has a cognizable claim under the New York State Constitution for this violation of his rights to the equal protection under the law.

447. Plaintiff was damaged thereby.

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[14] *See, Brown v. State*, 89 N.Y.2d 172, 187, 674 N.E.2d 1129, 1138-39, 652 N.Y.S.2d 223, 232-33 (1996) ("we conclude that a cause of action to recover damages may be asserted against the State for violation of the Equal Protection and Search and Seizure Clauses of the State Constitution").

SEVENTH CAUSE OF ACTION— VIOLATION OF THE FREEDOM OF RELIGION, DUE PROCESS, AND RIGHT TO PETITION CLAUSES OF THE N.Y.S. CONSTITUTION

448. Plaintiff repeats and reiterates the above allegations as if fully set forth here at length.

449. Defendant has deprived Plaintiff of the freedom of religion, and discriminated against him on the basis of his religion and affiliation with other people of the Jewish faith, in violation of the Constitution of the State of New York.

450. Defendant has deprived Plaintiff of due process of law, in violation of the Constitution of the State of New York.

451. Defendant has deprived Plaintiff of the right to petition government for the redress of grievances, in violation of the Constitution of the State of New York.

452. Plaintiff was damaged thereby.

EIGHTH CAUSE OF ACTION— VIOLATION OF THE TAKINGS CLAUSE OF THE N.Y.S. CONSTITUTION

453. Plaintiff repeats and reiterates the above allegations as if fully set forth here at length.

454. Defendant has deprived Plaintiff of property, and has taken Plaintiff's property, in violation of the Constitution of the State of New York.

455. Plaintiff was damaged thereby.

456. Plaintiff requests this Court's declaration that compensatory relief for a regulatory taking of property is available only under federal law, based upon

current controlling precedent of the N.Y.S. Court of Appeals.

NINTH CAUSE OF ACTION—
DECLARATORY RELIEF DECREEING CONSULTANT FEE ORDINANCE INVALID ON ITS FACE AND AS APPLIED

457. Plaintiff repeats and reiterates the above allegations as if fully set forth here at length.

458. The Defendant Town has enacted a local law providing for the reimbursement of Town consultants (e.g., lawyers, engineers, planners) in connection with land use applications. *See*, Town of Chester Code, Chapter 48, which can be found at www.ecode360.com/print/CH0648.

459. Section 48-3 provides, at subsection "E":

> "The Planning Board, Zoning Board of Appeals or Town Board shall neither place the application on the agenda nor give further consideration to the applicant's application until all application review fees imposed on the applicant have been paid to the Town." (*(emphasis added)*

460. The Planning Board has interpreted this to mean that Plaintiff cannot be heard on the issue of whether he is being wrongfully or excessively invoiced for the Town consultants' services.

461. In particular, the Planning Board has delayed proceeding forward on Plaintiff's application, purportedly for non-payment of its consultants' fees, without invoicing Plaintiff for such fees and advising him of the need for payment.

462. The Town consultants' work was in review of Plaintiff's EIS documents under SEQRA.

463. Moreover, when the Planning Board eventually provided Plaintiff with its consultants' invoices, Plaintiff properly disputed those invoices as improper, excessive, redundant, duplicative and unauthorized.

464. Specifically, by letter to the Town Board and Planning Board dated June 24, 2011, Plaintiff appealed to the Town Board disputing the consultant fee charges.

465. Nevertheless, the Planning Board refused to further process Plaintiff's land use application, even though such refusal contravenes the State's SEQRA regulation. *See*, 6 N.Y.C.R.R. 617.13(f) ("Such appeal procedure must not interfere with or cause delay in the EIS process or prohibit an action from being undertaken");

466. Moreover, the Town Board failed to process Plaintiff's consultant fee appeal within the 45 time period established by Town Code § 48-5.

467. Consequently, Plaintiff's application was placed on hold, thereby forcing Plaintiff into another period of delay.

468. The consultant fee reimbursement provisions contained in Chapter 48 are open-ended, and essentially allow the Town and its consultants to demand a "blank check" from an applicant to pay for unnecessary reviews, apparently at the unfettered discretion of the Town's consultant, with no check on such fees (as the applicant, not the Town, pays the fees; thus, there is no constraint of reasonableness placed upon the consultant).

469. There is one constraint imposed upon the Town's consultants, which is that the applicant can appeal consultant fee abuse to the Town Board.

470. However, after Plaintiff timely filed such appeals in 2010 and 2011, the Town Board simply ignored the appeal and refused to act.

471. Because of the Town Board's refusal to act, Plaintiff made a written demand upon the Town Board; and, within one month thereafter, commenced an Article 78 proceeding in State Court challenging the consultant fee exactions. *See, Sherman v. Town of Chester Town Board et al.*, Index No. -11.

472. Plaintiff has commenced an Article 78 proceeding in this Court, challenging the Town's administrative action in exacting consultant fees from him. *See, Matter of Steven Sherman*, Orange County Index # 010376/2011 (Woods, J).

473. On its face, and as applied, the Defendant's consultant fee regulation is invalid as a violation of due process, equal protection, and as a governmental taking of property without just compensation.

474. This Court must so declare.

A. No opportunity for a hearing as to consultants' fees

475. The failure of the Town and its Planning Board to make provisions in its Consultant Fee ordinance (for a land use applicant to be adequately heard as to a monetary exaction made against him by the Town) deprives the applicant of basic due process, namely, the ability to be heard when his property is being taken. The Town Code provides for an "appeal", but does not set forth a procedure for such appeal.

476. In light of the complexity of SEQRA and SEQRA reviews, the many complexities of land use cases, and the significant amounts of money that may be involved (as here, in the amount of over $80,000), an applicant who disputes invoiced charges should have the opportunity for an arbitration or similar hearing to impartially resolve the dispute at a constitutional minimum.

477. Without an impartial adjudicator, an "appeal" essentially becomes a constitutionally meaningless charade.

478. An opportunity for a hearing, before an impartial adjudicator, is the minimum that due process requires.

479. Therefore, because of the many deficiencies described above, the Town's consultant fee reimbursement provisions contained in Chapter 48 must be declared invalid, on its face, and void.

480. Alternatively, for this additional reason, the Town's consultant fee reimbursement provisions must be adjudged and declared as unconstitutional, on its face and as applied, as Plaintiff has not been afforded the opportunity to be heard regarding the legitimacy, validity, excessiveness and otherwise invalidity of the invoices as billed against his project; and as Plaintiff's project is delayed, notwithstanding the SEQRA regulation, which prohibits the delay of processing of an application that is pending a fee appeal.

481. Plaintiff requests the Court to declare that the Town's failure to provide Plaintiff with the ability to be heard by the Planning Board or the Town Board is a violation of his due process rights.

482. Because the action taken by the Town, and especially its "appeals" process, do not involve "random and unauthorized acts," but rather are matters of formal Town procedure, all applicants disputing consultant fee charges are entitled to a pre-deprivation hearing by the Town prior to such fees being exacted from the applicant.

483. Accordingly, even if the Town is authorized to exact consultants' fees (notwithstanding that such are unlimited, open-ended and set by the self-interested consultants), the Court should declare that Plaintiff has the due process right to an impartial adjudicator to resolve *bona fide* disputes regarding the amount of the consultants' fees.

484. In sum, this Court must declare that the Town's consultant fee ordinance is unconstitutional on its face and as applied; and that to the extent that such ordinance or future ordinance is permissible, it must include a provision for an impartial hearing prior to demanding payment of a disputed fee.

PLAINTIFF DEMANDS A JURY TRIAL HEREIN.

WHEREFORE, Plaintiff prays that this Court grant judgment against the Defendants awarding Plaintiff damages and other appropriate relief as follows:

a. An award of compensation for the taking of his real property under New York State law and 42 U.S.C. § 1983;

b. An award of damages under New York State law and 42 U.S.C. § 1981 and § 1983 for the violations of law alleged herein;

c. An award granting Plaintiff reimbursement of "consultant fees" paid to the Town, to the ex-

tent such relief is more appropriate in this action than in the pending article 78 proceeding;

d. A declaration that Plaintiff has been denied his right to petition the Town,

e. A declaration that the Town's consultants' fee reimbursement regulation is unconstitutional and invalid;

f. An order converting to any portion of this action to a proceeding under CPLR Article 78 to the extent this court deems such is necessary;

g. An award of reasonable attorneys' fees and the costs of this action under 42 U.S.C. § 1988, together with such other and further relief as this Court may deem just and proper.

Jury Demand

Plaintiff requests trial by jury in this action.

Dated: Stony Point, New York
January 12, 2012

MICHAEL D. DIEDERICH, JR.
Attorney for Plaintiff
By:

/s/ Michael D. Diederich, Jr.
Michael D. Diederich, Jr.
Attorney for Plaintiff
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Exhibit "1" MareBrook conceptual layout

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 12 Civ. 00647 (ER)(GAY)

STEVEN M. SHERMAN,

Plaintiff,

-against-

TOWN OF CHESTER, ITS TOWN BOARD, AND ITS PLANNING BOARD,

Defendants.

NOTICE OF MOTION

PLEASE TAKE NOTICE that, upon the annexed Declaration of Joseph J. Haspel, Esq. and the exhibits annexed thereto; the accompanying Memorandum of Law in Support of Defendants' Motion to Intervene, and upon all pleadings and proceedings heretofore had herein, Laroe Estates, Inc. will move this Court before the Honorable Edgardo Ramos at the United States District Court for the Southern District of New York, located at 40 Foley Square, New York, New York 10601, on a date and time to be determined by the Court, for an Order, pursuant to Fed. R. Civ. P. 24 granting it leave to intervene, together with such other and further relief as this Court deems just, equitable, and proper.

PLEASE TAKE FURTHER NOTICE that the scheduling of filing opposition papers shall be in accordance with the Minute Entry of the Court's Docket dated June 20, 2014

Dated: July 31, 2014
Goshen, New York

/s/ Joseph J. Haspel
Joseph J. Haspel, Esq.
Attorney for Laroe Estates, Inc.
1 West Main Street
Goshen, New York 10924
845-694-4409

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 12-00647 (ER)(GAY)

STEVEN SHERMAN,

Plaintiff,

-against-

TOWN OF CHESTER, ITS TOWN BOARD, and IT'S PLANNING BOARD

Defendants.

MEMORANDUM OF LAW

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[Table of Contents omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 12-cv-00647 (ER)(GAY)

STEVEN M. SHERMAN,

Plaintiff,

-against-

TOWN OF CHESTER, ITS TOWN BOARD, AND ITS PLANNING BOARD,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF LAROE ESTATES, INC. TO INTERVENE

Laroe Estates, Inc. ("Laroe") respectfully submits this Memorandum of Law in support of its Motion for Leave to Intervene as Defendants in this action, pursuant to Federal Rule of Civil Procedure 24.

This case presents, *inter alia*, a constitutional Takings Claim asserted by Plaintiff, Steven M. Sherman ("Sherman"). However, while Sherman does have an interest in the real property at the core of this controversy, Laroe too has an interest. And, as will be shown below, Laroe's interest is more significant, as a matter of law, than Sherman's interest.

Since Laroe's interest cannot be adequately protected by any other party, and since proceeding with

this action without Laroe will necessarily impair and impede Laroe's ability to protect itself, Laroe makes this motion to intervene as a party plaintiff. A copy of Laroe's proposed pleading is annexed as Exhibit A.

I. FACTS

Sherman commenced this lawsuit asserting various causes of action.[1] A copy of the Complaint is annexed as Exhibit B. After this action was commenced, the defendant, Town of Chester ("Town" or "Chester") made a pre-answer motion to dismiss (Docket Nos. 6, 7, and 8), and by Opinion and Order dated March 20, 2013, this Court granted the motion (the "Dismissal Order") (Docket No. 14).[2] Sherman appealed the Dismissal Order and on May 16, 2014, the United States Court of Appeals for the Second Circuit reversed the Dismissal Order (the "Second Circuit Decision"). A copy of the Second Circuit Decision is annexed as Exhibit C.

Twelve days later, in accordance with Chamber's Rules, Laroe's counsel wrote the Court seeking a pre-motion conference relating to its desire to move to intervene in this action. (Docket No.16). The promotion conference occurred on June 20, 2014 at which time the Court fixed a schedule for this motion.

For the purpose of this motion to intervene, Laroe will focus on the Constitutional Takings claim. The facts as alleged in the Complaint were reviewed in

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[1] Since the commencement of this action, Sherman has deceased and Nancy Sherman as executor of the Estate of Steven Sherman has been substituted as Plaintiff.

[2] The Court also remanded the non-Federal claims back to State Court.

the Second Circuit Decision vacating the Dismissal Order. Laroe adopts the Statement of Facts set forth in the Second Circuit Decision.

In summary, Sherman has alleged that he was the proponent of a subdivision application before the Chester Planning Board. He further alleges that the conduct of the Town effectuated a *de facto* taking of the subject real property defined in the Complaint as "MareBrook" (the "Real Property"). This conduct was exhaustively chronicled in the Second Circuit Decision, and the Second Circuit concluded that if the facts as alleged in the Complaint were true, the conduct of the Town had effectuated a taking.

With the background fully set forth in the Second Circuit Decision, the focus turns to Laroe's position and how the facts support this application for intervention. The natural starting point is Sherman's Complaint, which states in its pertinent part:

> 363. As a result of the Town's obstruction of Plaintiffs attempts to use and develop his real estate, Plaintiff has been the subject of foreclosure proceedings. Due to economic necessity, Plaintiff has been forced to contract away the majority of his economic interest in MareBrook to lenders and investment partners; and one of his lenders, TD Bank, has obtained a personal judgment against Plaintiff in the sum of $4 million. Collection action against Plaintiffs personal assets is an obvious possibility.
>
> 364. Plaintiff has lost 80% or more of his equity and ownership share of MareBrook to bring in investors.

Laroe believes that the Complaint's reference to "investment partners" is a reference to Laroe. How-

ever, the term "investment partner" is a misnomer. In fact, as is fully discussed below, Laroe is the equitable owner of the Real Property. The facts supporting Laroe's equitable ownership follow.

On June 4, 2003, Sherman and Laroe entered into a contract for the purchase and sale of the Real Property, a copy of which is annexed as Exhibit D (the "Sherman/Laroe Contract"). The essence of the Sherman/Laroe Contract was that Laroe would purchase the Real Estate and the price would be based upon the number of lots approved by the Town upon Sherman's application. As is discussed ***infra***, certain terms of the Sherman/Laroe Contract, including the purchase price, were later amended.

The provisions of the Sherman/Laroe Contract which are relevant to the instant application are as follows: A) Pursuant to ¶4(A), Sherman was responsible for prosecuting the subdivision application before the Town, however, the land use planning issues (i.e. size and location of building lots and road configuration) were subject to Laroe's approval; B) Through the various provisions in ¶4(B) of the Sherman/Laroe Contract, Laroe was responsible for many of the developments costs; C) ¶11 of the Sherman/Laroe Contract provided:

> 11. RISK OF LOSS:
>
> In the event of any taking of the Property by the power of eminent domain, or casualty to the Property which would reasonably hinder or interfere with Purchaser's [Laroe's] proposed use or development of the Property, then Purchaser may terminate this Agreement by written notice to Seller, in which event Purchaser shall receive a reimbursement in immediately available fed-

> eral funds of all monies paid by Purchaser to Seller hereunder together with accrued interest at the annual rate of ten (10%) percent from and including the relevant date of payment by Purchaser to Seller to and including the date of reimbursement by Seller to Purchaser. **If Purchaser does not elect to terminate this Agreement, then Seller and Purchaser shall be deemed to have elected to proceed with Closing, in which event Seller shall assign to Purchaser all of Seller's right, title and interest in and to any and all claims and proceeds Seller may have with respect to any condemnation awards or insurance proceeds relating to the Property.** (emphasis added)

Notwithstanding all the events that have transpired in the last decade, the Sherman/Laroe Contract was never terminated. To the contrary, on May 7, 2013, Sherman and Laroe agreed to an amendment of the Sherman/Laroe Agreement entitled "Settlement Agreement and Amendment of Purchase and Sale Agreement Dated June 4, 2003 (the "Amendment"), a copy of which is annexed as Exhibit E.

Through the Amendment, Sherman acknowledged: A) That Laroe had advanced $2,550,000 into the project (the "Laroe Advances"); B) That Sherman had defaulted on his obligations to not only Laroe, but alsoTD Bank causing the entry of a judgment of foreclosure; and C) That Sherman and Laroe en-

gaged in an arbitration proceeding to settle their differences.[3]

The Amendment then proceeded to modify the payment terms of the Sherman/Laroe Contract to provide that the purchase price would be the Laroe Advances, plus any amount paid to settle Sherman's obligation to TD Bank, plus lots approved based upon a formula. Settlement with TD Bank was in the sole discretion of Laroe and in the event the TD Bank Mortgage foreclosure was not settled prior to foreclosure sale, Laroe had the ability to terminate the Sherman/Laroe Contract, as amended. (Amendment ¶2).

The Amendment further provided:

> Section 3.
>
> Subject to Purchaser's performance in transferring the Lots, if any, as set forth in Section 2, the purchase price for the Property is deemed paid in full as provided hereinabove.

Thus, through the Amendment, Sherman recognized that he had been paid in full for the Real Property, subject only to the possibility of future consideration in the form of lots depending upon the number of lots ultimately approved by the Town.

Notwithstanding the parties acknowledgment of full payment by Laroe, in order to protect Laroe, closing would not occur until the foreclosure proceeding was resolved (Amendment ¶6). As stated above, settlement with TD Bank was in the sole discretion

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[3] Although not set forth in the Amendment, the Arbitration Ruling required Sherman to convey the Real Property to Laroe (Exhibit F).

of Laroe, and Laroe had the option of terminating the Sherman/Laroe Contract if a foreclosure sale occurred.

The Amendment further provided:

> 7. Application & Approval Option. A. Within 30 days of the date hereof, Purchaser and Seller shall cause the Application to be amended to add Purchaser as an additional "applicant" thereunder. All further expenses of the application to be paid by Purchaser. ...

Simply stated, after Sherman's defaults with TD Bank and Laroe, and after the Arbitration (which gave Laroe full rights in the Real Property), the Amendment further memorialized Laroe's equitable ownership of the Real Property. Contemporaneously with the Amendment, the parties executed other agreements including a consulting agreement which provided Sherman with the ability to continue to participate in the development of the Real Property. A copy of which is annexed as Exhibit G.

After the Amendment, and after the facts alleged in the Complaint occurred, which fact led the Second Circuit to conclude that a taking had taken place, TD Bank concluded its foreclosure proceeding (See, Exhibit H).

II. - LEGAL ARGUMENT

A. Under New York Law, Laroe Holds Equitable Title To the Subject Real Property, Which Interest Is Superior to The Bare Legal Title Held By Sherman

In New York, a land contract vendor (Sherman) holds legal title, while the land contract vendee (Laroe) holds equitable title. "[The execution of a contract for the purchase of real estate and the making of a part payment gives a contract vendee equitable title to the property and an equitable lien in the amount of the payment." *Polish Natl. Alliance of Brooklyn v. White Eagle Hall Co.*, 98 A.D.2d 400, 405, 470 N.Y.S.2d 642 (2nd Dep't 1983); *New York Cent. & Hudson Riv. R. R. Co. v Cottle*, 187 A.D. 131, 144 (4th Dep't 1919), *affd* 229 NY 514 (1920) (holding: "It is well settled that the owner of the real estate from the time of the execution of a valid contract for its sale is to be treated as the owner of the purchase money and the purchaser of the land is to be treated as the equitable owner thereof. The purchase money becomes personal property"); *Bean v. Walker*, 95 A.D.2d 70, 72, 464 N.Y.S.2d 895 (4th Dep't 1983); *Carnavalla v. Ferraro*, 281 A.D.2d 443, 722 N.Y.S.2d 47, 48 (2nd Dep't 2001); *Lowenstein v. Reikes*, 140 Misc. 645, 251 N.Y.S. 618 (N.Y. Sup.Ct. Queens Co.1931).

In effect, holding equitable title gives the land contract vendee full rights of ownership. *In re Site for Jefferson Houses, City of New York*, 306 N.Y. 278, 282, 117 N.E.2d 896, 898 (1954); *Karp v. Twenty Three Thirty Ryer Corp.*, 185 Misc. 440, 442, 56 N.Y.S.2d 783, 785, *aff'd* 270 A.D. 758, 59 N.Y.S.2d 919 (1st Dep't 1946) (holding that a contract vendee is

in equity considered as the owner and so acquires an 'estate and interest' in the real property. 'A contract for the sale of real estate immediately vests in the purchaser the equitable title while the vendor remains seized in the land for the benefit of the purchaser and holds the legal title only as security for the payment of the remainder of the purchase price. *See also,* Williams v. Haddock, 145 N.Y. 144, 39 N.E. 825 (1895) *Lippe v. Genlyte Grp. Inc.*, 98 CIV. 8672(DC), 2002 WL 531010 (S.D.N.Y. 2002), stating:

> Legal title is formal title that is evidenced by a deed or other instrument constituting evidence of ownership rights in property. See Black's Law Dictionary 1493 (7th ed.1999). Equitable title, on the other hand, is "a beneficial interest in property and ... gives the holder the right to acquire formal legal title." (*Id.*). In New York, transfer of legal title to property can be effected only by actual physical delivery and acceptance of an executed deed. *Mitchell v. Bartlett*, 51 N.Y. 447, 447 (1873) ("[L]egal title cannot vest under a deed before its delivery."); N.Y. Real Prop. § 244 (McKinney 1989). Upon the execution of a contract for the sale of land, however, the purchaser acquires equitable title to the property, and the vendor is treated as the owner of purchase money, *i.e.*, personal property. *Bean*, 464 N.Y.S.2d at 897 (*citing Williams v. Haddock*, 145 N.Y. 144, 150 (1895)); *Penny Lane Owners Corp. v. Conthur Development Co.*, No. 94 Civ. 0940, 2000 WL 178189, at 10 (Feb. 16, 2000 S.D.N.Y.) (citations omitted). The vendor holds the legal title in trust for the purchaser, and has an equitable lien against the property for payment of the purchase price. *Bean*, 464 N.Y.S.2d at 897; *Penny Lane*, 2000

> WL 178189, at *10. Legal title does not vest in the purchaser until the contract terms are satisfied. *Bean*, 464 N.Y.S.2d at 897 (citations omitted).

Id.

In the context of a takings case, the issues presented are analogous to a condemnation. It is well settled that "[i]n order to have standing in a condemnation proceeding one must show an ownership interest in the property" (*In re Port of New York Auth.*, 12 A.D.2d 18, 20 [1960], *citing Matter of City of New York* [*Jefferson Houses-Lombardi*], 306 N.Y. 278 (1954) (holding that the vendee under an executory contract to purchase land was an owner). Likewise, the Appellate Division, Second Department found that a claimant seeking compensation for condemned property may seek recovery by demonstrating an equitable interest therein, as opposed to legal title" (*Johnson v. State*, 10 A.D.3d 596, 597 (2nd Dep't 2004).

With respect to a governmental taking by condemnation, the Appellate Division has held that the transaction is between the taker (the government) and the holder of equitable title. The Appellate Division stated:

> This is not a case of thrusting the equities of a party on him, but of holding him to his contract. The vendor is able to give him all he contracted to. The state has intervened, and under its right of eminent domain substituted for the land its value. In legal effect, as between vendor and vendee, the award becomes the subject of the conveyance. The plaintiff took the equitable title, subject to the exercise of the right of eminent do-

> main, precisely as though the legal title had been transferred; and the possibility of the land being taken for public use should be deemed to have been within the contemplation of the parties. The taking of land by proceedings in invitum is in a legal sense a purchase and sale (Vandermulen v. Vandermulen, 108 N. Y. 195, 15 N. E. 383), and, of course, the equitable owner must be deemed the vendor.

Clarke v. Long Island Realty Co., 126 A.D. 282, 283, 110 N.Y.S. 697, 698 (2nd Dep't 1908).

Based upon the foregoing authority, it is clear that Laroe was the owner of a substantial interest in the Real Property at issue in this case, and it was the owner of that interest at the time of the taking by Chester. Indeed, if this were a simple condemnation case, there is no question that based upon the law cited above, as well as the Contract between the parties which gave Laroe an assignment of any condemnation award, Laroe would have most, if not all of the right to collect damages from the Town. The fact that this is a constitutional takings case and not a condemnation proceeding is a distinction without a difference.

Laroe is mindful of the case cited in the Town's correspondence prior to the pre-motion conference, *R & V Dev., LLC v. Town of Islip*, 05CV5033(DRH)(MLO), 2007 WL 14334 (E.D.N.Y. Jan. 3, 2007) which found, contrary to well settled law, that a contract vendee is not the equitable owner of real property with an interest in the real property. It is respectfully submitted that that case, which is not binding on this court, does not address the law of equitable ownership. Accordingly, it is

respectfully submitted that it is not good law. Regardless, in this case under the "Risk of Loss" provision set forth above, it is Laroe that has the contractual interest in any and all claims and proceeds Sherman may have with respect to any condemnation (takings) awards.

B. Rule 24 Intervention

1) This Court Must Construe Rule 24 Broadly And Resolve All Doubts In Favor Of Intervention

The purpose of Rule 24 intervention is twofold: "to foster economy of judicial administration and to protect non-parties from having their interests adversely affected by litigation conducted without their participation." *See, e.g., Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977).

This Court must construe Rule 24 liberally in favor of intervention. *US. Postal Serv. v. Brennan*, 519 F .2d 188, 193 n.2 (2d Cir. 1978) ("The policy of liberalizing the right to intervene in federal actions is reflected in the change of language of Rule 24(a) in 1966."). Accordingly, any doubt as to whether Laroe should be permitted to intervene in this action should be resolved in its favor.

2) FED. R. CIV. P. 24(A) Entitles Laroe To Intervention In This Case As A Matter Of Right

Laroe seeks to intervene herein as a matter of right pursuant to Fed. R. Civ. P. 24(a), which provides, in relevant part, as follows:

> Intervention of Right. On timely motion, the court must permit anyone to intervene who:
>
> * * *
>
> (2) claims an interest relating to the property or transaction that is the subject of the ac-

> tion, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

In this Circuit, Laroe may satisfy the Rule 24(a)(2) requirements by showing that it (1) timely filed an application to intervene, (2) established an interest in the action, (3) demonstrated that the interest may be impaired by the disposition of the action, and (4) show that the interest is not protected adequately by the parties to the action. *"R" Best Produce Inc. v. Shulman Corp.*, 467 F.3d 238, 240 (2d Cir. 2006). Generally, the court's analysis must take into consideration the totality of the circumstances. *Farmland Dairies v. Comm'r of the N Y. State Dep't of Agric. & Mkts.*, 84 F.2d 1038, 1044 (2d Cir. 1988). For the reasons set forth below, Laroe satisfies each requirement and should be permitted to intervene.

C. Laroe's Motion to Intervene Is Timely

To determine whether the motion of a party seeking to intervene is timely, the Second Circuit considers four factors: "(1) how long the applicant had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness." *In re Bank of NY Derivative Litig.*, 320 F.3d 291, 300 (2d Cir. 2003) (*quoting United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994).

1(A) Notice of interest: Laroe seeks to intervene immediately after the Second Circuit Decision reversing the District Court's dismissal and remanding

the matter for further proceedings. At this juncture, issue has not been joined, and there has been no discovery. This application has been made at Laroe's earliest opportunity and therefore it satisfies each of the four criteria. Because this case is in the preliminary motion stage of the litigation, i.e. a new "motion to dismiss" stage, there has been no delay in the filing of the motion and no prejudice will result to the parties if Laroe intervenes. *See United States for the Use and Benefit of Frank M. Sheesley Co. v. St. Paul Fire and Marine Insurance Co.*, 239 F.R.D. 404, 412 (W.D.Pa. 2006) (the motion to intervene was timely when filed while the case was still in its initial stages and the discovery period was still open).

Laroe learned about this case after it was commenced, and after Chester moved to dismiss the action. Based upon the issues presented in the Motion to Dismiss, Laroe determined to await the outcome of the motion before taking any action. Then, the case was dismissed based upon this Court's finding that that actions of the Town were not final. Accordingly, there was no action in which Laroe could intervene. Its time to intervene accrued only after the Second Circuit Decision was rendered. Laroe has acted promptly in filing its motion to intervene. Indeed, Laroe moved before issue was joined, and prior to the Town has indicating whether it will be making another pre-answer motion to dismiss.

1(B) No Prejudice to Existing Parties. Since this action is in its earliest stage, the existing parties to this action will not be prejudiced if Laroe is permitted to intervene. Permitting Laroe to intervene will

not delay the action in any way. Likewise, it would neither extend nor expand discovery.

1(C) Prejudice to Laroe. Although the existing claimants would not be prejudiced by Laroe' s intervention, Laroe would be significantly prejudiced if it were not permitted to intervene. By showing that it is the equitable owner of the subject Real Property, Laroe has demonstrated an interest in the litigation, and this interest may be impaired by the disposition of the action without intervention because the plaintiff cannot adequately represent Laroe's interest. Indeed, Sherman has little to no incentive to ensure that Laroe's interests are addressed and satisfied. *Cf. Berroyer v. United States*, 282 F.R.D. 299 (E.D.N.Y. 2012); *Turkmen v. Ashcroft*, 02-CV-2307 JG, 2010 WL 3398965 (E.D.N.Y. 2010) report and recommendation adopted, 02-CV-2307JG SMG, 2010 WL 3398968 (E.D.N.Y. Aug. 26, 2010); *Cole Mech. Corp. v. Nat'l Grange Mut. Ins. Co.*, 06 CIV. 2875 LAK HBP, 2007 WL 2593000 (S.D.N.Y. 2007); *CARS (Citizens Against Retail Sprawl) v. U.S. Army Corps of Engineers*, 04-CV-0328E(SR), 2007 WL 2778605 (W.D.N.Y. 2007)

In addition, if Laroe is not allowed to intervene in this action, it may be barred by the applicable statute of limitations from commencing its own action covering all of its damages. This is especially true in this case where, under the Second Circuit Decision, the accrual date for statute of limitations purposes is difficult to isolate. *See, New Jersey Carpenters Health Fund v. Residential Capital, LLC*, 08 CV 8781 HB, 2010 WL 5222127 (S.D.N.Y. Dec. 22, 2010)

1(D) Any unusual circumstances militating for or against a finding of timeliness.

Since this action was commenced, two unusual circumstances have occurred which altered Laroe's position. First, Sherman's default with respect to his obligations to TD Bank has resulted in a foreclosure. Historically, Laroe's interests were in developing the Real Property. Now, as a result of the foreclosure, Laroe seeks to recover its losses. As the Second Circuit Decision clearly casts blame for the projects financial failure upon the Town's conduct, it logically follows that this lawsuit is the appropriate vehicle for Laroe to seek recovery of its losses.

Secondly, Laroe has historically dealt with Steven Sherman. While that relationship was not without controversy, it was always clear that both Steven Sherman and Laroe were united in interest in pursuit of the Real Property's subdivision application. Now, Steven Sherman has deceased and Laroe is without a person with whom it feels it is united in interest.

D. Laroe Has a Direct Personal and Financial Interest in the Lawsuit.

As shown above, Laroe has a direct interest in the subject matter of this litigation. The issue presented in this lawsuit is whether the Town's actions constituted a taking of the Real Property. Laroe is the equitable owner and proposed developer of the property. Thus, if the Town took the Real Property, it took Laroe's property.

E. Laroe's Interest Will Be Impaired, Impeded, and Prejudiced if They It Is Not Permitted to Intervene.

The remedy for a Takings Claim is just compensation for the value of the property taken. *Moden v. United States*, 404 F.3d 1335, 1342 (Fed. Cir. 2005); *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1157 (Fed. Cir. 2014); *Lost Tree Vill. Corp. v. United States*, 115 Fed. Cl. 219, 231 (Fed. Cl. 2014). Thus, the value of property taken by way of government action is the limitation of the government's exposure when it takes property. All parties with an interest in property taken have a stake in the outcome. Issues of fact, including the value of the property in the aggregate and the value of each party's interest in the subject property must be determined. *See, e.g. United States v. Detroit Int'l Bridge Co.*, 7 F.3d 497, 501 (6th Cir. 1993) (holding that the disposition of the condemnation proceedings at issue would impair the ability of proposed intervenors to protect their interest and granting intervention as a matter of right).

Here, Laroe should have the ability to protect its interest by participating in any proceeding which determines the value of the subject real property taken by governmental action.

Moreover, in order to fairly adjudicate the issues presented, the trier of fact will have to determine the relative allocation of rights over the fund created by the determination of value. Specifically, what is the value of Sherman's bare legal title as compared to Laroe's equitable title in the subject property. Unless Laroe participated, the allocation would likely be unfairly skewed.

F. The Parties Currently Participating in the Turnover Action Cannot Adequately Represent Laroe.

An intervenor's burden of showing that its interests may not be adequately represented is, generally speaking, a "minimal" one. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); Brennan, 579 F.2d at 191. Laroe easily meets this burden.

Laroe's interest in this matter is not adequately represented by Sherman. The interests of Sherman and Laroe are not necessarily identical and, as set forth above, they are conflicting. *See U.S. ex rel. Frank M Sheesley Co. v. St. Paul Fire & Marine Ins. Co.*, 239 F.R.D. 404, 409 (W.D. Pa. 2006). Sherman, as an adversary of Laroe, cannot, adequately represent Laroe's interests. Sherman has his own agenda. Because the proceeds from any judgment or settlement may not be sufficient to satisfy all interest, each claimant will seek to maximize his potential recovery to the exclusion of the other interest holders. Consequently, unless Laroe is permitted to intervene, no one will represent its interests. *See Brody v. Spang*, 957 F.2d at 1123 (3d Cir. 1992) ("the presumption of adequacy is defeated if the movant shows a sufficient divergence between its interests and those of the existing party"). The present motion was filed after Laroe requested a meeting with Sherman's to determine a method to proceed with unity. The parties have not been able to determine such a method.

3) ALTERNATIVELY, LAROE SHOULD BE PERMITTED TO INTERVENE UNDER FED. R. CIV.P. 24(b).

Even if this Court concludes that Laroe does not qualify to intervene as a matter of right under Fed. R. Civ. P. 24(a), it should, nevertheless, be permitted to intervene under Rule 24(b), governing permissive intervention. This section provides, in relevant part, as follows: Permissive Intervention.

In General. On timely motion, the court may permit anyone to intervene who:

* * * *

> (B) has a claim or defense that shares with the main action a common question of law or fact.
>
> * * *
>
> (3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

The requirement for common questions of law or fact is "read in the disjunctive; i.e., only one common question of law or fact is required." William Schwartzer, A. Tashima, & James Wagstaff, Fed. Civil Procedure Before Trial, § 7:249 (2012).

As a general rule, when exercising its discretion under Rule 24(b), the Court "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Courts may also consider (1) the nature and extent of the intervenor's interests, (2) the degree to which those interests are adequately represented by other parties, and (3) whether parties seeking intervention will significantly contribute to full development of

the underlying factual issues. *Resto-A-Dent Labs, Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d 871, 875 (2d Cir. 1984); *U. S. Postal Serv. v. Brennan*, 579 F.2d 188, 191-92 (2d Cir. 1978).

The reasons supporting Laroe's request to intervene as a right also support its request for permissive intervention under Rule 24(b). The existing parties will not be prejudiced, and adjudication of the claims will not be delayed. Moreover, Laroe's interests will be significantly prejudiced without such intervention and Sherman cannot adequately represent the Laroe's interests.

CONCLUSION

For all the foregoing reasons, it is respectfully requested that Laroe's motion be granted and Laroe be permitted to intervene.

Dated: July 31, 2014
Goshen, New York

/s/ Joseph J. Haspel

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 12-cv-00647 (ER)(GAY)

STEVEN M. SHERMAN
and LAROE ESTATES, INC.

Plaintiff,

-against-

TOWN OF CHESTER, ITS TOWN BOARD,
AND ITS PLANNING BOARD,

Defendants.

COMPLAINT

Intervening Plaintiff, Laroe Estates, Inc., through its attorney Joseph J. Haspel, complains of the Defendants as follows:

THE PARTIES

1. Plaintiff, Steven M. Sherman, was at all times relevant herein, a citizen of the United States and a resident of the Town of Monroe, County of Orange, and State of New York. Since the commencement of this action, Steven M. Sherman has deceased and Nancy Sherman is the executor of his Estate.

2. Laroe Estates, Inc. is a New York corporation with its principal place of business located a 5 Eastview Avenue, Monsey, New York.

3. Defendant, Town of Chester ("Town") is and was, at all times relevant hereinm, a municipal

corporation organized and existing under the laws of the State of New York, with its Town Hall located at 1786 Kings Highway, Chester, NY 10918.

4. Defendant, Town Board of the Town of Chester ("Town Board") is and was at all times relevant herein, the duly elected governing body of the Defendant Town.

5. Defendant, Planning Board of the Town of Chester, ("Planning Board") is and was, at all times relevant herein, the duly appointed planning board of the Defendant Town. The Town, Town Board and Planning Board are collectively referred to herein as (the "Town of Chester").

JURISDICTION AND VENUE

6. This is a pending action having been removed to Federal Court by the Defendants.

7. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343(a)3 and (a)4, which confer original jurisdiction of federal district courts to redress the deprivation of rights, privileges and immunities secured by the laws and Constitution of the United States.

8. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b), and the acts and transactions complained of occurred in this district.

STATEMENT OF FACTS[4]

9. The Town Board is the governing body of the Town of Chester, and the Planning Board gives approvals to land use development proposals.

10. In March of 2000, Sherman applied to the Planning Board for subdivision approval so that he could use and develop a parcel of real property defined in Sherman's Complaint as "MareBrook" ("MareBrook" or the "Real Property").

11. The proposed project was to include 385 units of housing as well as "an equestrian facility, baseball field, tennis courts, clubhouse, onsite restaurant and a golf course that wove through the property."

12. When Sherman completed his purchase of the property in 2001, it was already zoned for residential use.

13. In July 2001, the Town Board announced that it was imposing a six month moratorium on major subdivision approvals retroactive to May 1, 2001.

14. At least two members of the Town Board expressed the view that "the Moratorium was specifically aimed at Plaintiffs MareBrook project."

15. Sherman was the only developer affected by the Moratorium, even though other projects were similarly situated.

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[4] The Statement of Facts is largely taken from the Decision of the United States Court of Appeals for the Second Circuit which vacated in part the decision of the District Court dismissing Sherman's Complaint herein. *Sherman v. Town of Chester*, 752 F.3d 554 (2d Cir. 2014)

16. When the six month period expired, the moratorium was extended, which "singularly affected" Sherman.

17. During the extension, Sherman applied for a "minor" subdivision approval that was permitted under the moratorium. However, the Town still refused to allow Sherman to pursue the application.

18. Sherman brought suit against the Town in state court, and as a result of the lawsuit, the Town ended the moratorium, but not until January 2003.

19. The six month moratorium lasted over a year and a half.

20. In October 2003, the Planning Board" deemed complete" Sherman's Draft Environmental Impact Statement ("DEIS").

21. That determination established that Sherman's application to the Town was satisfactory in form and content.

22. In 2003, the Town Board approved the first in a series of changes to its zoning regulations.

23. On June 4, 2003, Sherman and Laroe entered into a contract for the purchase and sale of the Real Property.

24. The essence of the Sherman/Laroe Contract was that Laroe would purchase the Real Estate and the price would be based upon the number of lots approved by the Town of Chester upon Sherman's application.

25. Laroe and its principals are real estate developers with decades of experience.

26. The Sherman/Laroe Contract was part of an assembly of multiple parcels, which included not only

the Real Property, but contiguous parcels to the Real Property (the "Other Projects").

27. Subsequent to the Sherman/Laroe Contract Sherman continued to prosecute the subdivision application as provided for in the Sherman/Laroe Contract.

28. When Sherman learned of the new zoning requirements early in 2004, he was assured by the Town Planner, Garling Associates, that he could meet all its requirements "with only a modest amount of additional work" and that he would soon obtain preliminary approval.

29. Approximately five months later, sometime in late May to early June 2004 Sherman finished revising his plan.

30. However, by this time, the Town of Chester had already amended its zoning regulations.

31. Garling Associates, which helped write the new regulations, did not tell Sherman about the changes; even though it was advising Sherman about complying with the 2003 regulations.

32. These zoning amendments created several new requirements, further delaying Sherman.

33. It took Sherman approximately eleven months to once again revise the application to meet these new zoning requirements.

34. In accordance with the Sherman/Laroe Contract, Laroe participated in the development and revisions of the application.

35. However, the Town of Chester refused to entertain Sherman's application, despite holding meetings concerning another development.

36. In or about 2005, the Town amended its zoning law for a third time without informing Sherman in advance.

37. Accordingly, Sherman and Laroe revised the once application again.

38. In February 2006, the Town for the fourth time changed its zoning law without warning Sherman.

39. Sherman and Laroe responded by submitting yet another revised plan, this one in March 2007.

40. That same month, the Town changed its zoning for the fifth time, and it once again did not let Sherman know these changes were coming.

41. In November and December of 2008, Sherman and Laroe once again resubmitted the MareBrook application and Supplemental DEIS.

42. By this point, over eight years had passed since Sherman first applied for subdivision approval.

43. In January 2009, the Town Engineer gave Sherman a list of corrections to the 2008 Supplemental DEIS.

44. As part of that list, the Town Engineer demanded final designs for water and sewer plants.

45. However, Sherman and Laroe could not submit the final water and sewer designs until other aspects of the plan – like the number and location of the homes – were finalized But that, in turn, required preliminary approval, which was the very thing Sherman was trying to obtain from the Planning Board.

46. A few months later, the Town appointed a new Town Engineer.

47. The new appointee needed time to get up to speed on MareBrook.

48. The Town billed Sherman for the expense of having the new Town Engineer review the entire MareBrook project, even though Sherman already paid for the first engineer to conduct that same review.

49. The new Town Engineer had an entirely new set of questions, concerns, and items for Sherman to address.

50. Despite that, for two years the new Town Engineer maintained his predecessor's requirement regarding sewer and water plant designs.

51. In September 2009, Sherman and Laroe submitted two different versions of the subdivision proposal.

52. By now, the proposals had become much more conventional than Sherman's first application, and they did not include the recreational facilities initially envisioned.

53. Soon after submitting the proposals, Sherman discovered that the Planning Board Chairman had been replaced.

54. The new Chairman, Don Serotta ("Serotta"), was "openly hostile" towards the MareBrook application.

55. Serotta had written letters to the Town in 2001 against the project.

56. Serotta was also adverse to Laroe's Other Projects.

57. For three months, the Planning Board refused without explanation to put Sherman's proposals on the agenda.

58. In December 2009, Serotta explained that Sherman needed to pay $25,000 in consultants' fees.

59. However, Sherman did not receive an invoice for those fees, as required by the Town Code, for approximately two months.

60. Serotta had other demands for the project as well.

61. Serotta required an additional "cluster plan," which would lead to yet another reworking of Sherman's DEIS.

62. Serotta also insisted that all roads must be twenty-four feet wide- instead of thirty feet.

63. This required Sherman to redraw his plans to relocate curbs, drainage, watere and sewer mains, and grading.

64. Thereafter, Serotta canceled Sherman's appearance at the Planning Board's monthly meeting and demanded an additional $40,000 more in consultants' fees.

65. The Planning Board also insisted that Sherman respond to a questionnaire, which required Sherman to provide, among other things, an evaluation of a traffic intersection in the Town of Monroe (located miles away) and the details of a wetlands walking trail crossing which did not cross any wetlands.

66. Sherman was also required to answer all inquiries by local residents. Some answers to these questions needed to be repeated twenty to forty times because the Planning Board did not permit him to quote a previous answer.

67. In September 2010, the Planning Board voted to accept Sherman's DEIS as complete, seven years

after his original DEIS was first "deemed complete" in October 2003.

68. A few months later, Ted Fink replaced Garling Associates as the Town Planner.

69. Fink requested an additional study regarding traffic on the other side of town even though Sherman had long before completed that study.

70. Fink also sent monthly lists of demands to Sherman, which included a "wetland study," a "concerted species study," and a "constraints study."

71. The new studies concluded that there were no changes since those same studies were completed in 2003.

72. Fink also required Sherman to redo the DEIS, despite the fact that it had just been deemed complete.

73. The Town's machinations to prevent the development of MareBrook were not without cost.

74. Between taxes, interest charges, carrying costs and expenses, Sherman spent approximately $5.5 million on top of the original $2.7 million purchase price.

75. In furtherance of the project, Laroe provided $2,550.000.00 to Sherman.

76. On or about January 12, 2012, Sherman commenced this action by filing a Complaint in the Supreme Court of the State of New York – County of Orange (the "Complaint").

77. Laroe incorporates by reference and repeats and reiterates Sherman's allegations of fact in the Complaint.

78. The action was subsequently removed to the District Court by Defendants.

79. The Town of Chester's conduct with respect to the MareBrook Application and the Other Projects amounted to a pattern of repetitive or unfair land-use procedures in order to avoid making any final decision.

AS AND FOR A FIRST CAUSE OF ACTION REGULATORY TAKING OF PLAINTIFFS' REAL PROPERTY, AND DENIAL OF HIS PROPERTY INTEREST IN USING, ENJOYING AND SELLING HIS REAL PROPERTY

(U S. Constit., amends. V, XIV)[5]

80. Laroe repeats and reiterates the allegations set forth in Paragraphs 1 through 79 of the Complaint herein.

81. When Laroe entered the Sherman/Laroe Contract, it reasonably believed and reasonably expected that Sherman would be able to obtain subdivision approval for his MareBrook project.

82. The repeated zoning changes and other roadblocks that Sherman and Laroe had to endure in their land use applications constituted takings.

83. The Town of Chester's actions, and that of its representatives, have prevented Sherman and Laroe from realizing any return on their investments in MareBrook and the Other Projects.

84. Plaintiffs have been denied any and all economically viable use, enjoyment or sale of the real

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[5] The Cause of Action tracks the Cause of Action pleaded by Sherman.

property through the Town's unreasonable and unjustified regulatory actions.

85. Laroe continued to reasonably believe and expect that its investment of $2,550,000 was not money wasted.

86. Laroe became contract vendee of MareBrook and the Other Projects in order to create a reasonable residential development.

87. As a consequence of the Town of Chester's abuse of its regulatory powers, through the enactment of sequential zoning laws, and its administration of the Planning Board process through unreasonable technical requirements, wrongful financial exactions and undue and unjustified delays, the Town of Chester financially exhausted Sherman.

88. The Town of Chester's techniques and methods of land use regulation, including constant rezoning and land use enactments (which do not substantially support the Town's master plan), and the Town's arbitrary and capricious administrative requirements imposed by financially self-interested consultants, constitute irrational regulation which does not support a valid public purpose.

89. The Town of Chester's 2001 land use moratorium, and subsequent changes to the Town's zoning and land use laws, regulations and the Town's interpretations thereof, were not designed to, and did not, substantially advance legitimate State or Town interests, and lack rational basis.

90. Defendant's zoning changes, upon information and belief, run against the master plan and comprehensive plans.

91. Regulatory actions taken to prevent residential development in an area zoned for residential development, in order to maintain a a de facto nature preserve, constitute "reverse spot zoning" and, for this additional reason, are irrational governmental action.

92. The zoning actions of the Town of Chester were intentionally directed at Plaintiffs to single them out and to discriminate against their subdivision proposals.

93. The Town of Chester's actions constituted unlawful "reverse spot zoning" as they were designed to impermissibly prevent Plaintiffs' legitimate and reasonable proposed use and development of their real property.

94. Despite being required to do so, the Town failed to prepare its own EIS (generic, supplemental or otherwise) when its revised land use ordinance(s) had the potential for significantly affecting the environment.

95. The Town of Chester's actions herein have deprived Plaintiffs of all use and enjoyment of their real property, including, but not limited to, the right to develop and sell any portion of such property; thus constituting a per se regulatory taking of Plaintiffs' property.

96. The Town of Chester's actions in denying Plaintiffs of all use, enjoyment and benefit of their real property amounts to a categorical taking of Plaintiffs' real property by the Town.

97. The Town of Chester's regulatory actions taken herein, to the present, are supported by little, if any, valid public purpose, whereas the burden imposed upon Plaintiffs has been oppressive and devas-

tating; thus constituting a regulatory taking of his property without just compensation under the teachings of the US Supreme Court in Penn Central. *See, Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

98. The Town of Chester' land use law changes were not of environmental significance, as indicated by the Town's own declarations of environmental non-significance in the form of Negative Declarations ("NegDec's) under SEQRA.

99. The Town of Chester's land use law changes were used by the Town to impose oppressive regulatory burdens upon Plaintiffs, preventing them from using, developing and enjoying their property and destroying them financially.

100. In balancing the Town's legitimate interest against the legitimate interests of the property owner, both legal title and equitable title, the balance clearly indicates that the Town has taken Plaintiffs' real property.

101. By constantly and unreasonably changing its land use laws, continuing to this day, the Town of Chester has deprived Plaintiffs of all economically viable use of their land on a temporary and permanent basis.

102. Upon information and belief, the Town of Chester's actions essentially amounted to the creation of open space and visual easements for the benefit neighbors and others in the Town.

103. Upon information and belief, this amounted to a de facto invasion of Plaintiffs' property, and the taking of land, and the property interest of visual easements and easements to light and air, for the benefit of the townspeople.

104. This constitutes a *per se* taking of Plaintiffs' real property without due process or the payment of just compensation.

105. Upon information and belief, the indefinite and potentially permanent keeping of Plaintiff's lands in an undeveloped, semi-forested state, thereby allowing it to be sown with tree seeds from neighboring property, constitutes an actionable invasion of property by the action of the Town and a further actionable taking of Plaintiffs' property.

106. Upon information and belief, Defendants' governmental actions and processes created an extraordinary delay regarding Plaintiffs' right to use and subdivide the property thereby destroying the "incidents of ownership" to which Plaintiffs are entitled under the Fifth and Fourteenth Amendments of the United States Constitution, and constitute a "taking" of property without due process or just compensation.

107. Upon information and belief, by its actions the Town of Chester has perpetrated both an actual regulatory and de facto regulatory taking of Plaintiffs' property.

108. Upon information and belief, by its actions the Town of Chester has perpetrated an actual or de facto invasion of Plaintiffs' property, on the pretext of acting within the Town's police powers.

109. Upon information and belief, the Town's constant re-zonings, affecting MareBrook and the Other Projects, cumulatively created a local regulatory scheme that violated *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922), namely, that "while property may be

regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

110. Moreover, under *Penn Central* and subsequent cases, the Town's actions have so frustrated distinct investment-backed expectations as to amount to a taking of property when considering factors such as:

- the economic impact on the Plaintiff of the challenged rule, regulation or statute;
- the extent to which the regulation interferes with investment-backed expectations; and
- the nature of the challenged action.

111. Through the Town of Chester's actions, it has sought to prevent Plaintiffs from exercising their vested rights, obtained by law and/or equity, to subdivide and develop the Real Property.

112. Alternatively, Defendants have, through intent or negligence, improperly delayed Plaintiffs' ability to obtain a "vested" property interest in their land use applications.

113. Upon information and belief, Defendants are liable to Plaintiffs under the " pecial facts" exception, and also as a matter of equitable estoppel.

114. Laroe has been damaged thereby.

WHEREFORE, Laroe prays that this Court grant judgment against the Defendants awarding it damages and other appropriate relief as follows:

a. An award of compensation for the taking of Laroe's interest in the subject real property,

b. Such other and further relief as to this Court seems just and proper.

Dated: Goshen, New York

August 5, 2016

/s/ Joseph J. Haspel
Joseph J. Haspel, Esq.
Attorney for Laroe Estates, Inc.
1 West Main Street
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RECORD AND BRIEFS

FILED
FEB 24 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-605

IN THE
Supreme Court of the United States

TOWN OF CHESTER,
Petitioner,

v.

LAROE ESTATES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether intervenors participating in a lawsuit as of right under Federal Rule of Civil Procedure 24(a) must have Article III standing, or whether Article III is satisfied so long as there is a valid case or controversy between the named parties.

PARTIES TO THE PROCEEDING

Town of Chester, petitioner on review, was the defendant-appellee below.

The Town Board of the Town of Chester and the Planning Board of the Town of Chester are listed on the court of appeals docket as defendants-appellees, but the district court had dismissed the claims against them at the time of the appeal. The court of appeals subsequently amended the caption of the case to list only Town of Chester as the defendant-appellee.

Laroe Estates, Inc., respondent on review, was the movant-appellant below.

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IN THE

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No. 16-605

TOWN OF CHESTER,
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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 828 F.3d 60. Pet. App. 1a-19a. The district court's opinion denying Laroe Estates, Inc.'s motion to intervene is not published. Pet. App. 20a-59a.

JURISDICTION

The Second Circuit entered judgment on July 6, 2016. On September 23, 2016, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including November 3, 2016, and the petition was filed on that date. On January 13, 2017, this Court granted the petition. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Article III, Section 2, Clause 1 of the U.S. Constitution states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Federal Rule of Civil Procedure 19 provides:

> (a) Persons Required to Be Joined if Feasible.
>
> (1) *Required Party*. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> * * *
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

> (i) as a practical matter impair or impede the person's ability to protect the interest[.]

Federal Rule of Civil Procedure 24 provides:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
>
> (1) is given an unconditional right to intervene by a federal statute; or
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.
>
> (b) Permissive Intervention.
>
> (1) *In General.* On timely motion, the court may permit anyone to intervene who:
>
> (A) is given a conditional right to intervene by a federal statute; or
>
> (B) has a claim or defense that shares with the main action a common question of law or fact.
>
> (2) *By a Government Officer or Agency.* On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:
>
> (A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) *Delay or Prejudice.* In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) *Notice and Pleading Required.* A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

INTRODUCTION

In 2008, Steven Sherman sued the Town of Chester for an alleged regulatory taking. Respondent Laroe Estates, Inc. ("Laroe"), a prospective developer of Sherman's property, was also frustrated by the Town's actions, but Laroe could not initiate an identical suit because it lacked a sufficient interest in the property. If Laroe had filed its own suit, the Town of Chester could have quickly obtained a dismissal of the complaint on Article III standing grounds. And if Laroe had joined Sherman's complaint as a co-plaintiff, that too would have led to a swift and successful motion to dismiss Laroe for lack of Article III standing.

Laroe did neither of these things. Instead, the company waited more than six years, and only then moved to enter Sherman's suit as an intervenor-plaintiff under Federal Rule of Civil Procedure 24(a). As logic would dictate, when the Town opposed the motion, the District Court denied intervention as of

right because Laroe could not satisfy the Article III standing requirements. The Second Circuit, however, reversed. It did not question the District Court's holding that Laroe lacks Article III standing in this suit. Rather, it held that an intervenor under Rule 24(a) does not need to meet constitutional standing requirements at all.

That cannot be right. There is no difference between a plaintiff and an "*intervenor*-plaintiff" that would justify a constitutional constraint on one but not the other. To the contrary, intervention as of right is simply the means by which an entity "become[s] a 'party' to a lawsuit" and "assume[s] the rights and burdens attendant to full party status." *U.S. ex rel. Eisenstein* v. *City of N.Y.*, 556 U.S. 928, 933-934 (2009). Chief among the rights of a party is the ability to invoke the court's authority to decide issues and to compel other litigants to comply with litigation demands. As this Court has said time and again, an entity may not "invoke the authority of a federal court" unless it has standing. *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 342 (2006).

This case is therefore a simple one. An intervenor exercises the same rights as an original party, and a court may not authorize a person to exercise those rights unless she has Article III standing. The Court's constitutional precedents—and, indeed, Rule 24(a) itself—make this clear. The Second Circuit's decision to the contrary should be reversed.

STATEMENT

A. Intervention As Of Right In Civil Litigation

1. Intervention is "the requisite method for a nonparty to become a party to a lawsuit." *Eisenstein*, 556 U.S. at 933. Once admitted to a suit, an intervenor as of right is placed on "equal" footing "with the original parties" and is "entitled to litigate fully on the merits." 7C Charles Alan Wright et al., *Federal Practice & Procedure* § 1920 (3d ed. Apr. 2016 update).

Intervenors as of right may thus exercise all of the privileges and powers of litigation. They can raise new claims, lodge new defenses, and seek new forms of relief. *See* Fed. R. Civ. P. 24(c); Wright, *supra*, §§ 1921-1922. They can subpoena documents, *see, e.g.*, *Perry* v. *Schwarzenegger*, 602 F.3d 976, 980 (9th Cir. 2010), and demand discovery, *see, e.g.*, *Grinnell Corp.* v. *Hackett*, 519 F.2d 595, 596 (1st Cir. 1975); *South Carolina* v. *North Carolina*, 558 U.S. 256, 287-288 (2010) (Roberts, C.J., concurring in the judgment in part and dissenting in part). If there are settlement discussions, intervenors are entitled to participate. *See Local No. 93* v. *City of Cleveland*, 478 U.S. 501, 529-530 (1986). If hearings are conducted or the case goes to trial, intervenors can demand a jury, *see Ross* v. *Bernhard*, 396 U.S. 531, 541 n.15 (1970), and present evidence, *see, e.g.*, *Georgia* v. *Ashcroft*, 539 U.S. 461, 476 (2003); *Trbovich* v. *United Mine Workers of Am.*, 404 U.S. 528, 537 (1972). If an intervenor ultimately prevails in her suit, she may—in certain circumstances—be entitled to attorney's fees. *See, e.g.*, *United Steelworkers of Am., AFL-CIO-CLC* v.

Sadlowski, 435 U.S. 977 (1978) (White, J., dissenting from denial of certiorari).

An intervenor as of right therefore enjoys a status far more significant than her distant cousin, the *amicus curiae*. *See Int'l Union* v. *Scofield*, 382 U.S. 205, 209 (1965) (contrasting an intervenor with "an amicus [who] is not a 'party' to the case"). She is a party like any other, with all of the rights the Federal Rules of Civil Procedure grant.

2. Because of the substantial powers that intervenors as of right exercise, courts have long restricted the circumstances in which a person or entity may obtain this status. While the historical origins of the practice of intervention are murky, it most likely originated in Roman law. *See* James WM. Moore & Edward H. Levi, *Federal Intervention I. The Right to Intervene and Reorganization*, 45 Yale L.J. 565, 568 (1936); *Florida* v. *Georgia*, 58 U.S. (17 How.) 478, 502 (1854) (Curtis, J., dissenting). If so, intervention's earliest antecedent was very limited indeed; Roman law permitted intervention only at the appeals stage. Moore & Levi, *supra*, at 568.

By the time of the Founding, lower courts sometimes permitted a person to intervene, but intervention was typically available only by a formal complaint—in a manner equivalent to the initiation of a new suit—or by "[e]xamination *pro interesse suo*," a writ that allowed intervention in cases in which the intervenor's property "had been seized" and was in the hands of "the court." 2 C. L. Bates, *Federal Equity Procedure: A Treatise on the Procedure in Suits in Equity in the Circuit Courts of the United States including Appeals and Appellate Procedure* §§ 625, 628, at 661, 664 (1901); *see* Moore & Levi,

supra, at 569-572. Over the following century and a half, intervention remained "narrow in scope," and the procedures governing the practice were "not well developed nor of very general applicability." Wright, *supra*, § 1901.

In 1938, Congress "codifi[ed]" the longstanding "doctrines of intervention" in Federal Rule of Civil Procedure 24. *Mo.-Kan. Pipe Line Co.* v. *United States*, 312 U.S. 502, 508 (1941). The Rule required district courts to grant "[i]ntervention [as] of right" only if a statute provided "an unconditional right to intervene," if the intervenor would be "bound by a judgment in the action," or if the intervenor would be "adversely affected" by the "distribution or other disposition of property in the custody of the court." Fed. R. Civ. P. 24(a) (1938). Rule 24 also gave courts discretion to grant "[p]ermissive intervention" to a person raising a claim or defense sharing a common "question of law or fact" with the original parties' claims. Fed. R. Civ. P. 24(b) (1938).

Rule 24 was amended in 1966 to dispense with some of its "formal" requirements, but the Rule's fundamental contours remained the same. Fed. R. Civ. P. 24(a)(2) advisory committee's note to 1966 amendment; *see New Orleans Pub. Serv., Inc. (NOPSI)* v. *United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir. 1984) (explaining that "the *kind* of interest necessary [for intervention] was not affected"). The drafters removed the text requiring that an intervenor be "bound" by a judgment. That alteration was intended to clarify that the Rule was not targeted at those potentially affected by res judicata, but rather those whose rights would inevitably be adjudicated in a case—such as the "benefi-

ciary of [a] trust" in a suit involving the trustee or an unnamed "member of a class" in class action litigation. Fed. R. Civ. P. 24(a)(2) advisory committee's note to 1966 amendment; Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 401-407 (1967). The drafters also relaxed the requirement that disputed property actually be "in the custody or subject to the control or disposition" of a court. Fed. R. Civ. P. 24(a)(3) (1946). This restriction, the drafters found, was outdated, and in any event had not been interpreted strictly. Fed. R. Civ. P. 24(a)(2) advisory committee's note to 1966 amendment.

As revised in 1966, Rule 24(a) mirrored—almost verbatim—the text of Rule 19(a)(1)(B), the mandatory joinder provision. The drafters explained that Rule 24 was intended to be a "counterpart" to Rule 19, and to allow a "comparable" class of persons to voluntarily intervene in a suit. *Id.*

3. The text of Rule 24 has not changed materially since 1966. Now, as then, Rule 24(a) provides that courts "must" grant intervention to any person who (1) "is given an unconditional right to intervene by a federal statute" or (2) "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the [person]'s ability to protect [her] interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a). Rule 24(b) states that courts "may" also grant intervention to parties who have a conditional statutory right to intervene or "a claim or

defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B).

Courts may restrict the extent to which permissive intervenors are able to participate in a lawsuit. *See Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370, 378 (1987); Wright, *supra*, § 1922. But the Rules provide no equivalent authority to deny intervenors as of right the status of full parties. *See* Fed. R. Civ. P. 24(a) (providing that intervention "must" be granted). Accordingly, apart from "reasonable" conditions "of a housekeeping nature," courts must allow intervenors as of right to exercise all of the powers of litigation afforded ordinary litigants. Wright, *supra*, § 1922.

B. Factual and Procedural Background

1. Sixteen years ago, Steven Sherman sought approval from the Town of Chester planning board to build a subdivision on land he had purchased with the help of a mortgage from TD Bank. Pet. App. 3a, 21a-22a; J.A. 27. While his application to the planning board was pending, Sherman contracted with Laroe. Sherman and Laroe agreed that, if the Town approved Sherman's subdivision application, Laroe would purchase some of the lots for development. Pet. App. 3a. Laroe made several interim payments to Sherman under the agreement. *Id.*

Sherman never obtained approval for the subdivision. *Id.* at 22a-23a. Ultimately, he defaulted on his mortgage payments, and TD Bank commenced foreclosure proceedings on Sherman's undeveloped property. *Id.* at 3a. Laroe attempted to buy the property from Sherman to prevent foreclosure, but he failed to do so. *Id.* at 3a-4a. TD Bank foreclosed on the land in May of 2014. *Id.* at 4a.

2. In 2008, Sherman filed a suit against the Town in federal court, alleging—among other things—a regulatory taking. *Id.* at 23a. Sherman voluntarily dismissed that suit in 2012 and then filed a nearly identical suit in New York state court. *Id.* at 23a-24a. The Town removed that suit to federal court, where it was dismissed as unripe. *Id.* at 24a. Sherman appealed. *Id.* In 2014, the Second Circuit held that Sherman could proceed with his takings claim, and remanded the case to the District Court for consideration of the merits. *Id.* at 24a-25a. During the pendency of these proceedings, Sherman passed away, but his estate continued to pursue the litigation. *Id.* at 2a, 4a.

On remand from the Second Circuit, and more than six years after the litigation began, Laroe filed a motion to intervene as a plaintiff pursuant to Rule 24(a)(2) or Rule 24(b). *Id.* at 53a. Laroe's intervenor complaint purported to make its own takings claim, J.A. 157-162, and sought damages separate from Sherman's, *id.* at 162. Laroe claimed that Sherman's estate was unwilling to continue pursuing Sherman's takings claim and that Laroe needed to take up the cause. Pet. App. 13a. The Town opposed intervention. *Id.* at 10a-11a; J.A. 9-10.

The District Court denied the motion to intervene. Pet. App. 57a. Applying established circuit precedent, the court held that Laroe lacked any ownership interest in Sherman's property and so lacked standing to pursue a takings claim against the Town. *Id.* at 55a-57a (citing *U.S. Olympic Comm.* v. *Intelicense Corp., S.A.*, 737 F.2d 263, 268 (2d Cir. 1984)).

3. The Second Circuit vacated and remanded. *Id.* at 2a. The panel did not dispute the District Court's

conclusion that Laroe lacked standing. It held, however, that Laroe did not need to "show it had Article III standing" at all. *Id.* at 8a-9a. Rather, the court opined that so long as "a case or controversy has been established in the underlying litigation," there is "no need to impose the standing requirement upon a proposed intervenor." *Id.* at 7a (brackets omitted) (internal quotation marks omitted). In support of this view, the Court of Appeals observed that the Supreme Court sometimes resolves legal issues raised by both original parties and intervenors "without determining whether [the intervenors] independently have standing." *Id.* at 8a.

The panel declined to decide whether Laroe had a right to intervene under Rule 24(a)(2). *Id.* at 11a. The court noted that Rule 24(a)(2) requires an applicant for intervention to claim an interest in the suit that is "direct, substantial, and legally protectable." *Id.* at 13a (internal quotation marks omitted). The Court of Appeals also acknowledged that the Town's challenge to Laroe's standing was "essentially a challenge to" Laroe's ability to satisfy the "'interest' requirement of Rule 24(a)(2)." *Id.* Nonetheless, the Second Circuit remanded the case to the District Court to determine whether Laroe could satisfy Rule 24's requirements. *Id.* at 17a.

The Town of Chester petitioned for review, and this Court granted certiorari to decide "[w]hether intervenors participating in a lawsuit as of right under Federal Rule of Civil Procedure 24(a) must have Article III standing * * * or whether Article III is satisfied so long as there is a valid case or controversy between the named parties." Pet. i.

SUMMARY OF ARGUMENT

A person or entity that seeks to intervene as of right and thus become a "'party' to a lawsuit," *Eisenstein*, 556 U.S. at 933, must have Article III standing. Both the Constitution and Rule 24(a)(2) compel this straightforward conclusion.

I. Article III dictates that federal courts may exercise "the judicial Power" only as necessary to resolve a vital "Case" or "Controvers[y]" between litigants with standing. U.S. Const. art. III, § 2, cl. 1; *see Summers* v. *Earth Island Inst.*, 555 U.S. 488, 491 (2009). Therefore, standing is "not dispensed in gross": Courts may not consider any claim, award any relief, or decide any legal issue, large or small, unless they do so at the behest of an entity with standing. *DaimlerChrysler*, 547 U.S. at 353 (internal quotation marks omitted). Similarly, a party may not invoke the judicial power to issue subpoenas, demand discovery, or otherwise impose burdens on her fellow litigants unless she has standing. That is why a district court must grant a motion to dismiss any party that cannot satisfy the Article III standing requirements.

That is also why a court may not permit any person or entity without standing to intervene pursuant to Rule 24(a). Intervenors as of right exercise all of the rights of a party and have the same capacity to impose burdens on other litigants. Authorizing a person without standing to exercise these rights enlarges the judicial power, facilitating its use to "decid[e] issues [courts] would not otherwise be authorized to decide" and to compel discovery and testimony that could not otherwise be obtained. *Id.* Granting intervention to a person without standing

also wrests control of the suit from those litigants who have the most direct stake in the controversy. *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986). If a person without standing cannot intrude on a suit in this way at the outset, she surely cannot do so later through intervention.

Lower courts have offered no persuasive justification for exempting intervenors as of right from the requirements of Article III. The existence of a "case" or "controversy" between the original parties does not excuse an intervenor's lack of any cognizable stake in the case; standing is not "commutative." *DaimlerChrysler*, 547 U.S. at 352. Nor does the fact that the Supreme Court may *decide an issue* without resolving the standing of each party prove that a district court may permit a prospective intervenor to *enter* a suit without first scrutinizing her standing. A court has the authority to decide a particular issue so long as one party invoking that authority has standing; a court does *not* have the authority to bestow upon a party without standing the right to invoke the judicial power going forward.

II. Rule 24(a)(2) itself points to the same conclusion. The Court has long held that an intervenor as of right must have a "significantly protectable interest" in a suit—a standard that mirrors, in almost every particular, the requirements of Article III. *Donaldson* v. *United States*, 400 U.S. 517, 532 (1971). Moreover, the "interest" required for intervention as of right is, by design, the same as the interest necessary for mandatory joinder under Rule 19(a)(1)(B). It is virtually inconceivable that a person could be deemed a necessary party to a suit—and ordered to become an "involuntary plaintiff,"

Fed. R. Civ. P. 19(a)(2)—without satisfying the minima of Article III standing. Rule 24(a)'s history reinforces the conclusion that an intervenor's interest cannot be less than that required to establish standing. So do the improbable consequences of a contrary reading, which would enable an end-run around standing limits for plaintiffs and foster wasteful litigation in the district court by intervenors unable to press their claims on appeal.

III. Requiring intervenors to have standing benefits the courts and those who rightfully practice in them. It avoids the needless use of judicial resources to resolve the disputes of parties with no cognizable interest in a suit, and it protects other parties from unwarranted litigation burdens. Indeed, this case provides an excellent example of how an unwarranted intervenor can prolong and complicate litigation.

Enough is enough. Because Laroe lacks standing, the judgment below must be reversed.

ARGUMENT

I. INTERVENORS AS OF RIGHT MUST HAVE ARTICLE III STANDING.

Article III "require[s] that a litigant have standing to invoke the authority of a federal court." *DaimlerChrysler*, 547 U.S. at 342. This "essential and unchanging" requirement, although nominally imposed on litigants, in fact serves as the "fundamental" means of ensuring that the judicial power remains within its constitutional boundaries. *Id.* at 341-342 (quoting *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560 (1992), and *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997)). By exercising its power only at the behest of a person who has alleged a cognizable

injury, the "Federal Judiciary respects 'the proper—and properly limited—role of the courts in a democratic society.'" *Id.* at 341 (quoting *Allen* v. *Wright*, 468 U.S. 737, 750 (1984), *abrogated on other grounds by Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014)).

When an individual moves to intervene in a suit under Rule 24(a), she asks the court to grant her all "the rights and burdens [of a] party" that are set out in the Federal Rules of Civil Procedure. *Eisenstein*, 556 U.S. at 934. Paramount among those is the right to bring the judicial power to bear to decide issues, to impose the burdens of litigation on other parties, and to resolve any resulting disputes. *See, e.g.*, Fed. R. Civ. P. 37, 45, 56. In other words, intervention gives a person the right "to invoke the authority of a federal court." *DaimlerChrysler*, 547 U.S. at 342. When a court confers that right on an intervenor without ensuring that she has Article III standing, it transgresses the Constitution's limits on its judicial power and undermines, however subtly, the democratic principles those limits protect.

A. Parties Must Have Standing To Invoke The Judicial Power.

1. Article III provides that the "judicial Power shall extend to * * * Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. This Court has long cautioned that those words are both a grant of authority to the judicial branch and a restraint on the scope of that authority. By "limiting the judicial power" to cases and controversies, the Constitution "restricts" the judiciary "to the traditional role of Anglo-American courts." *Summers*, 555 U.S. at 492. Accordingly, courts may exercise no more authority

than is "necessary in the execution" of their constitutionally delegated function: "redress[ing] or prevent[ing] actual or imminently threatened injury to persons caused by private or official violation of law." *Id.*; *see Lujan*, 504 U.S. at 560. The judiciary's "power to declare the rights of individuals and to measure the authority of government[] * * * 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.'" *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (quoting *Chi. & Grand Trunk Ry. Co.* v. *Wellman*, 143 U.S. 339, 345 (1892)).

Standing doctrine polices this limit on the judicial power. It permits a person to invoke a court's authority only if she "has alleged such a personal stake in the outcome of the controversy as to * * * justify exercise of the court's remedial powers on [her] behalf." *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976) (internal quotation marks omitted). If a person cannot make that showing, exercise of the court's authority at her behest "would be gratuitous and thus inconsistent with the Art. III limitation." *Id.*

Limiting the class of litigants who can appear before the federal courts "serves several of the implicit policies embodied in Article III." *Valley Forge*, 454 U.S. at 472 (internal quotation marks omitted). Most notably, it preserves the separation of powers by "prevent[ing] the judicial process from being used to usurp the powers of the political branches." *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). In doing so, it vindicates the "central principle of a free society": courts must have "finite

bounds" to "protect citizens from * * * the excessive use of judicial power." *U.S. Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988).

Standing doctrine also embodies the constitutional policy in favor of providing "due regard for the autonomy of those most likely to be affected by a judicial decision." *Diamond*, 476 U.S. at 62. "The exercise of judicial power * * * can so profoundly affect the lives, liberty, and property of those to whom it extends" that it must be "restricted to litigants who can show 'injury in fact' resulting from the action which they seek to have the court adjudicate." *Valley Forge*, 454 U.S. at 473.

2. Only a robust standing doctrine can faithfully protect these constitutional principles. The Court has therefore emphasized time and again that "standing is not dispensed in gross." *Davis* v. *FEC*, 554 U.S. 724, 734 (2008) (brackets omitted) (internal quotation marks omitted); *DaimlerChrysler*, 547 U.S. at 353; *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000); *Lewis* v. *Casey*, 518 U.S. 343, 358 n.6 (1996). Article III is not satisfied simply because a case involves *some* controversy that has allegedly caused concrete injury to *some* litigant. Rather, every exercise of the judicial power—from an order that strikes down a major statute to a subpoena that commands a lowly document production—must be at the request of a litigant with standing. *See, e.g.*, *Lewis*, 518 U.S. at 358 n.6.

Hence, a party "must demonstrate standing for each *claim* [she] seeks to press," *Davis*, 554 U.S. at 734 (quoting *DaimlerChrysler*, 547 U.S. at 352) (emphasis added), and each "particular *issue*[]" she

asks the court to resolve, *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975) (emphasis added). She must also show "standing separately for each form of *relief* sought." *Friends of the Earth*, 528 U.S. at 185 (emphasis added). And there must be "an actual controversy [in existence] at all stages of review, not merely at the time the complaint is filed." *Steffel* v. *Thompson*, 415 U.S. 452, 459 n.10 (1974). Before a court may decide any question at any point, it must be confident that "the particular plaintiff" who invokes the court's authority has standing. *DaimlerChrysler*, 547 U.S. at 352 (quoting *Allen*, 468 U.S. at 752).

Furthermore, a district court must dismiss a plaintiff from a suit if another party successfully challenges her standing—regardless of whether other plaintiffs with standing are pursuing the same claims or seeking the same relief. This Court's decision in *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979), is illustrative. There, the Court considered the propriety of an award of summary judgment for lack of standing in a housing discrimination suit brought by a village and six individuals. *Id.* at 93-94. All of the plaintiffs appeared on the same complaints and sought the same declaratory and injunctive relief. *Id.* at 94-95. This Court held that the village and four of the individual plaintiffs had standing and could continue to pursue their claims in the district court. *Id.* at 109-115. But it held that the two remaining individual plaintiffs were "without standing" and could not remain in the litigation unless they "amend[ed] their complaints to include allegations of actual harm." *Id.* at 112 n.25; *see also Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 369, 374-375 (1982) (observing that the district

court had dismissed three of the four original plaintiffs for lack of standing and separately scrutinizing the standing of each of the plaintiffs that appealed their dismissal).

The district courts abound with similar cases in which one plaintiff is dismissed for lack of standing, while others are permitted to continue to press the same claims. *See, e.g.*, *Miller* v. *Albright*, 523 U.S. 420, 426-427 (1998) (explaining that petitioner's father had originally been a co-plaintiff raising the same claim, but was dismissed by the district court for lack of standing); *Nunez Colon* v. *Toledo-Davila*, 648 F.3d 15, 18 (1st Cir. 2011) (dismissing "the claims of the wife and children plaintiffs for lack of standing"); *Phillips* v. *Montgomery Cty.*, 24 F.3d 736, 737 (5th Cir. 1994) (per curiam) (observing that the district court had permitted the suit to continue but "dismissed one plaintiff" for lack of standing).

Thus, this Court's Article III precedent as a whole establishes that a plaintiff with standing to pursue one claim may not leverage that standing to press other extraneous claims or issues. And a plaintiff without standing may not leverage the presence of a plaintiff with standing to evade a motion to dismiss based on her failure to satisfy Article III. These rules ensure that the judicial power is not used in any way that is not "necess[ary]" to "the determination of real, earnest and vital controversy.'" *Valley Forge*, 454 U.S. at 471 (internal quotation marks omitted). A *court* is prevented from the gratuitous exercise of its authority to decide disputes, and a *litigant* is prevented from unnecessarily exercising the judicial power to impose burdens on other parties.

3. This latter point bears explanation. The judicial power is typically conceived of as a court's authority to issue definitive rulings in contested matters. But the power is not so limited; it extends to any circumstance in which a court compels the behavior of parties and nonparties to facilitate a controversy's resolution. *U.S. Catholic Conference*, 487 U.S. at 76. That authority to compel can be, and often is, exercised indirectly through litigants.

Take the subpoena power. Federal Rule of Civil Procedure 45 "grants a district court the power to issue subpoenas as to witnesses and documents." *Id.* But courts rarely issue these subpoenas themselves. Instead, Rule 45 permits a party, with the aid of her attorney, to serve a subpoena compelling the production of testimony or documents from a reluctant opponent or third party. Fed. R. Civ. P. 45(a)(3), (g). Even though a court may be unaware that a subpoena has issued, its power is implicated all the same, and Article III limits apply. *U.S. Catholic Conference*, 487 U.S. at 76 (the subpoena power is "subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution" (internal quotation marks omitted)).

If a person without standing exercises the subpoena power or otherwise wields the court's authority to compel acquiescence to her litigation demands, Article III's limits are violated. *Cf. Hein* v. *Freedom From Religion Found., Inc.*, 551 U.S. 587, 617 (2007) (Kennedy, J., concurring) (observing that the "burden[s] of discovery" justify tight restrictions on standing). Indeed, this Court has sometimes phrased the standing inquiry in the district court as

a question of whether a party has "standing *to litigate.*" *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997) (emphasis added).

4. Of course, these rules with respect to standing have their own limits. They do not block a court from deciding an *issue* when its resolution is "necessary in the execution of [the judicial] function." *Summers*, 555 U.S. at 492. For that reason, where multiple parties raise a single legal question, a court need not assure itself that each of the parties has standing before deciding *that question*. So long as one party has standing, that narrow exercise of the court's power is necessary to the resolution of a live controversy and thus permitted by Article III. It does not matter that other parties that lack standing will also benefit from the court's decision on the issue. After all, that is the case whenever a court publishes a precedential opinion.

For example, *this* Court typically needs only to assure itself that one party has standing before resolving the question presented in a case. The Supreme Court's jurisdiction is limited to deciding "the questions set out in the [certiorari] petition, or fairly included therein." Sup. Ct. R. 14(1)(a). Because this Court has such a discrete task, "the critical question" for it "is whether at least one [party] has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of" the Court's jurisdiction. *Horne* v. *Flores*, 557 U.S. 433, 445 (2009) (internal quotation marks omitted); *see also, e.g.*, *Rumsfeld* v. *Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). If one party meets that condition, it suffices to demonstrate that resolving the question presented is necessary to

the adjudication of a live controversy. The presence of other parties without standing is simply irrelevant.

That does not mean, however, that courts may authorize parties that lack standing to remain in a case for *other* purposes. If different parties raising a single issue seek different relief, then standing must be shown for each one. *See Horne*, 557 U.S. at 445 (holding that a remedial injunction must be narrowed to reflect only the interests of the plaintiffs with standing); *see also Rumsfeld*, 547 U.S. at 52 n.2 ("limit[ing]" the Court's "discussion" to the petitioner with standing). And a court cannot ratify a person's status as a party when—as in the district court—doing so will allow that person to invoke the court's authority in the future to decide distinct issues that may not otherwise be raised or to burden fellow litigants in ways they may oppose. *See, e.g.*, *Arizonans for Official English*, 520 U.S. at 64 (in order to have "standing to litigate, a person must show, first and foremost, an invasion of a legally protected interest" (internal quotation marks omitted)).

B. Intervenors As Of Right Must Have Standing Because They Implicitly And Explicitly Invoke The Judicial Power.

These principles lead inexorably to the conclusion that an intervenor as of right under Rule 24(a) must have standing.

1. When a motion to intervene is granted, an intervenor "become[s] a party." *Karcher* v. *May*, 484 U.S. 72, 77 (1987). She therefore "assume[s] the rights and burdens attendant to full party status." *Eisenstein*, 556 U.S. at 933-934. She can raise new

claims and seek new forms of relief. *See* Wright, *supra*, §§ 1921-1922. And she can exercise the numerous powers, large and small, afforded to parties by the Federal Rules and the Constitution itself. *Eisenstein*, 556 U.S. at 934.

She may, for example, seek summary judgment under Rule 56 or request a "jury trial on legal issues," *Ross*, 396 U.S. at 541 n.15. She may subpoena documents, *Perry*, 602 F.3d at 980, make discovery requests, *Grinnell*, 519 F.2d at 596, and present evidence, *Georgia*, 539 U.S. at 476. In certain circumstances, she may also receive an award of attorney's fees. *Sadlowski*, 435 U.S. 977 (White, J., dissenting from denial of certiorari); *see also supra* pp. 6-7.

In other words, like any other party, an intervenor can invoke a court's power to decide issues and to impose burdens on others. A district court cannot grant a motion under Rule 24(a) and authorize an intervenor to exercise these rights unless it determines that the intervenor has satisfied the Article III standing requirements. *See Valley Forge*, 454 U.S. at 472 ("[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury * * * ." (internal quotation marks omitted)).

That is all the more so because granting a motion to intervene expressly informs the original parties that the intervenor is entitled to "full party status," with all the burdens, rights, and privileges that entails. *Eisenstein*, 556 U.S. at 934. Opposing parties are thereby put on notice that they must, for example, respond to the intervenor's motions, discov-

ery requests, and deposition subpoenas. Meanwhile, those on the same side of the v. are made aware that they must tolerate the presence of a new party and the new claims, arguments, and alterations to the litigation strategy that she may bring with her.

If the intervenor's fellow parties would otherwise refuse to comply with some or all of these demands, then the intervenor is able to enjoy "full party status" only because the court has exercised its power to compel the acquiescence of those parties. Unless the intervenor has standing, that exercise of judicial power violates Article III.

Indeed, if an intervenor can enter a suit without satisfying Article III's requirements, then she will enjoy *more* than "full party status," at least in comparison with an original plaintiff. A plaintiff who appears on the complaint from the outset must be swiftly ejected from the suit if an opponent successfully moves to dismiss for lack of standing. *See Gladstone*, 441 U.S. at 112 n.25; *Havens Realty*, 455 U.S. at 369, 374-375; *supra* pp. 19-21. In that way, a defendant may avoid enduring any litigation burdens imposed by a plaintiff without standing. More importantly, the court can ensure that its power will not be invoked inappropriately to compel a defendant to submit to those burdens. But, if Article III standing is unnecessary for an intervenor, then—unlike an original plaintiff—she is *not* vulnerable to such a challenge. As a result, it is impossible to be confident that the judicial power will be exercised only within its constitutional boundaries.

2. Permitting intervention as of right without standing would also grievously undermine the "implicit policies embodied in Article III." *Valley Forge*,

454 U.S. at 472 (internal quotation marks omitted). In particular, keeping the standing doctrine free of unwarranted exceptions is crucial in "maintaining th[e] separation" of powers, *DaimlerChrysler*, 547 U.S. at 353, and the "finite bounds" on judicial authority that "exist to protect citizens from * * * the excessive use of judicial power," *U.S. Catholic Conference*, 487 U.S. at 77. *See also DaimlerChrysler*, 547 U.S. at 341 ("If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so.").

Standing doctrine effectively limits the judicial power because it tethers a court's authority to the "concrete and particularized" interests presented by the litigants that appear before it. *Lujan*, 504 U.S. at 560. But that tether is weakened if, through intervention, litigants may appear before the court pursuing a much wider range of interests that do not meet that description. The problem becomes obvious when one considers a hypothetical intervenor without standing who asks a court to decide a claim or to award a remedy that no party with standing has pursued. In the absence of the intervenor, the court would plainly lack the power to decide that question or issue that relief. *DaimlerChrysler*, 547 U.S. at 352 (claim must be pressed by a party with standing); *Friends of the Earth*, 528 U.S. at 185 (party with standing must request "each form of relief"). The court's power would break its constitutional restraint if it increased merely because of the presence of the intervenor who herself lacks standing.

Nor is that the only way an improper intervenor may impermissibly bring new issues into the district court's domain. She also does so merely by carrying

out the day-to-day tasks of civil litigation. An intervenor's discovery request may require a court to issue a ruling or award sanctions. *See, e.g.*, *Abrams* v. *Johnson*, 521 U.S. 74, 94-95 (1997). An intervenor's decision to introduce evidence may lead to a holding with respect to its admissibility. *See, e.g.*, *Georgia*, 539 U.S. at 476. And her request for attorney's fees may lead to a dispute over their propriety that a court must resolve. *See, e.g.*, *Sadlowski*, 435 U.S. 977 (White, J., dissenting from denial of certiorari). "With federal courts thus deciding issues they would not otherwise be authorized to decide, the 'tripartite allocation of power' that Article III is designed to maintain would quickly erode, [and] * * * the standing requirement's role in maintaining this separation would be rendered hollow rhetoric." *DaimlerChrysler*, 547 U.S. at 353 (quoting *Valley Forge*, 454 U.S. at 474).

Thus, this Court has emphasized that courts have no jurisdiction to address a subsidiary dispute that arises during the course of litigation unless the party seeking relief has standing in the underlying action: In *Diamond*, an intervenor that lacked a sufficient stake in the merits controversy sought to demonstrate standing to appeal based on his challenge to attorney's fees that were awarded against him in the district court. 476 U.S. at 70. This Court rejected that attempt, finding it obvious that a litigant may not satisfy Article III by pointing to "an injury that is only a byproduct of the suit itself." *Id.* at 70-71.

That conclusion only stands to reason. A subsidiary dispute may give rise to a gratuitous constitutional holding. Even controversies regarding the propriety of a request for discovery or the admissibil-

ity of a piece of evidence, for instance, often implicate constitutional rights and limits. *See, e.g.*, *Cheney* v. *U.S. District Court*, 542 U.S. 367, 381 (2004) (compelled document production may violate separation of powers); *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 34 (1984) (noting that "judicial limitations on a party's ability to disseminate information discovered in advance of trial" may "implicate[] the First Amendment rights of the restricted party"). To decide these rights in the context of a dispute provoked by an intervenor who lacks standing would violate the basic principle that "courts should be extremely careful not to issue unnecessary constitutional rulings." *Am. Foreign Serv. Ass'n* v. *Garfinkel*, 490 U.S. 153, 161 (1989) (per curiam).

3. Along with these weighty separation of powers concerns, dispensing with the standing requirements for intervenors would impermissibly wrest control of the litigation from "the hands of those who have a direct stake in the outcome." *Sierra Club* v. *Morton*, 405 U.S. 727, 740 (1972). This result would undermine the standing doctrine's role in protecting "the autonomy of those most likely to be affected by a judicial decision." *Diamond*, 476 U.S. at 62.

Thus, in *Valley Forge*, the Court emphasized that the standing doctrine must prevent "concerned bystanders" from interfering with the suits of those whose "lives, liberty, and property" will be "profoundly affect[ed]" by the outcome. 454 U.S. at 473 (internal quotation marks omitted). And in *Diamond*, concern for the "autonomy" of the parties with standing contributed heavily to the holding that a putative intervenor *without* standing may not appeal a deci-

sion the parties *with* standing are content to leave unreviewed. 476 U.S. at 62, 65, 71.

The same logic militates in favor of requiring intervenors as of right to show standing in the district court. Once permitted to become parties to a suit, intervenors may influence a wide range of litigation decisions, from which claims to press and how vigorously to pursue them, to which witnesses to subpoena and what trial date to request. Only those parties who "can show 'injury in fact' resulting from the action which they seek to have the court adjudicate" should be permitted to make decisions about how that adjudication will unfold. *Valley Forge*, 454 U.S. at 473.

The prerequisites for intervention under Rule 24(a) make it particularly important to ensure that improper intervenors do not usurp the rightful litigants' control of the suit. Under that Rule, an applicant for intervention typically must prove that she will seek to do something to "protect [her] interest" beyond what the "existing parties" who cannot "adequately represent that interest" might do. Fed. R. Civ. P. 24(a)(2). An intervenor who has satisfied that requirement will necessarily ask a court to exercise its authority in a way different than the original parties. This infringement on the "autonomy" of the original litigants is permissible only if the intervenor possesses a direct, personal stake in the litigation. *Diamond*, 476 U.S. at 62.

In short, the Constitution demands that intervenors as of right demonstrate standing, and the constitutional principles that Article III protects depend on the strict enforcement of this constitutional command.

C. There Is No Justification For Dispensing With The Standing Requirements For Intervenors As Of Right.

Although several courts of appeals have held that intervenors as of right need not satisfy Article III's standing requirements, none has offered a convincing rationale for that position.

1. Courts have sometimes attempted to justify allowing the participation of an intervenor without standing by claiming that there are "lessened justiciability concerns in the context of an ongoing Article III case or controversy." *Dillard* v. *Chilton Cty. Comm'n*, 495 F.3d 1324, 1330 (11th Cir. 2007) (per curiam). But this Court has already flatly rejected an analogous theory of "ancillary standing." *DaimlerChrysler*, 547 U.S. at 353. That a plaintiff may have "standing as to one claim" does not "suffice" to demonstrate standing over "all claims arising from the same 'nucleus of operative fact.'" *Id.* at 352. Still less does a court's jurisdiction over one plaintiff's claim suffice to establish jurisdiction over new issues introduced by *an entirely different party*. To hold as much would resurrect the oft-rejected proposition that standing is "dispensed in gross." *Lewis*, 518 U.S. at 358 n.6.

Nor may an intervenor without standing rely on the facile point that the text of Article III is satisfied so long as some "case" or "controversy" exists. This Court has long held that the Constitution's Case-or-Controversy provision may not be interpreted broadly if it is to serve its vital function in limiting the "judicial Power." *Lujan*, 504 U.S. at 559-560. After all, even "an executive inquiry can bear the name 'case' (the Hoffa case) and a legislative dispute can

bear the name 'controversy' (the Smoot–Hawley controversy)." *Id.* at 559. But Article III demands more. *Each* plaintiff that invokes a court's authority must point to a cognizable injury with respect to *each* claim that she pursues; standing is not "commutative." *DaimlerChrysler*, 547 U.S. at 352.

2. Courts on the other side of the circuit split also sometimes point to dicta from *Diamond*. *See, e.g.*, *Dillard*, 495 F.3d at 1330. The *Diamond* Court observed that, had a party with standing sought certiorari, the intervenor without standing could have "piggyback[ed]" on the petition and filed a brief or sought leave to participate in oral argument. 476 U.S. at 64. But that statement cannot possibly be read to establish that an intervenor as of right under Rule 24(a) can evade the standing requirements; *Diamond* expressly reserved that question. *Id.* at 68-69. In any event, in this Court even an *amicus curiae* may participate in briefing and oral argument. Sup. Ct. R. 28(7), 37(1). These activities are permissible for a much wider range of litigants because they do not introduce new issues for the Court to decide or burden other parties with additional demands. *Diamond* therefore says nothing about whether standing is required for persons or entities that seek to do more than act as an *amicus*. *See Rio Grande Pipeline Co.* v. *FERC*, 178 F.3d 533, 539 (D.C. Cir. 1999) (treating a potential intervenor without standing "as an amicus curiae" because "it sought only to contribute its views to those issues raised [in the main] petition for review and *** to participate in oral argument" and *Diamond* "says that an entity lacking Article III standing can do no more than that").

3. Finally, courts that make Article III standing optional for intervenors typically claim support from cases in which this Court has found jurisdiction to decide a question presented so long as one petitioner had standing. *See, e.g.*, Pet. App. 8a. But that is a serious misreading of these precedents. As noted, those cases establish that a court's jurisdiction to decide a particular *issue* is not destroyed by the presence of a party without standing. *See supra* pp. 22-23; *see also, e.g.*, *McConnell* v. *FEC*, 540 U.S. 93, 233 (2003), *overruled on other grounds by Citizens United* v. *FEC*, 558 U.S. 310 (2010). They do not establish that a court may permit an individual without standing to intervene under Rule 24(a) in order to participate as a party in the case going forward.

Indeed, the *McConnell* Court made very clear that there is a distinction between *this Court's* jurisdiction to decide a particular question despite the presence of intervenors that "lack Article III standing," and a *district court's* jurisdiction to grant intervention "pursuant to [Rule] 24(a)." *Id.* at 233. The *McConnell* Court held that the former was proper, but it reserved any decision on the latter. *Id.*

Unsurprisingly, this Court's cases simply do not establish that a prospective party may evade Article III's requirements, introduce new issues into a case, and place new and unwelcome burdens on the other parties to the litigation merely by filing a motion to intervene.

II. RULE 24(A)(2) REQUIRES INTERVENORS AS OF RIGHT TO SATISFY ARTICLE III.

If there is any doubt as to whether Article III requires a person to have standing to intervene as of

right, Rule 24(a)(2) resolves the question. That Rule demands that an intervenor have a "legally protectible" interest in the suit. And it requires that the interest be so substantial that the intervenor would be *mandatorily joined* under Rule 19 if intervention were not sought. The Rule's history, as well as the absurdities created by a contrary reading, reinforce the conclusion that the requirements of Article III standing are written into the Rule itself.

A. Rule 24(a)(2) Requires An "Interest" Equivalent To Article III Standing.

Rule 24(a)(2) provides that courts "must" permit any person to intervene in a suit who "claims an *interest*" in the case that may be "impair[ed] or imped[ed]" by the court's disposition, if that interest is not "adequately represent[ed]" by existing parties. Fed. R. Civ. P. 24(a)(2) (emphasis added). In *Diamond*, this Court declined to decide "the precise relationship between the interest required to satisfy th[is] Rule and the interest required to confer standing." 476 U.S. at 68. But its other precedents supply the answer: The same sort of "legally protected" interest necessary to supply standing is also needed to intervene under Rule 24(a)(2).

The Court indicated as much in *Donaldson*. That case arose when a taxpayer, Donaldson, sought to intervene as of right in a suit brought by the IRS to obtain tax documents from his employer, Acme. 400 U.S. at 520-521. Donaldson claimed an "interest" sufficient to intervene under Rule 24(a)(2) because the records the IRS sought "presumably contain[ed] details of Acme-to-Donaldson payments" and might be used in a criminal proceeding against him. *Id.* at 531. The Court held that was "not enough." *Id.*

"What is obviously meant" by Rule 24(a)(2)'s "interest" requirement, it explained, is "a *significantly protectable* interest." *Id.* (emphasis added). Donaldson's mere "desire" to prevent production of the records therefore did not suffice. *Id.* Because Donaldson had no "privilege" to seek "suppression" of the tax documents, he lacked an interest "of sufficient magnitude" to justify intervention. *Id.*

Donaldson thus understood Rule 24(a)(2)'s "interest" requirement to demand a "*legally* protectible" interest. *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 315 (1985) (discussing *Donaldson*). Moreover, as Justice O'Connor explained, *Donaldson*'s analysis "[c]learly * * * calls for" an interest that is "direct and concrete," not "abstract" and "speculative"; a mere "desire" to prevent anticipated future harms is not enough. *Diamond*, 476 U.S. at 75-76 (O'Connor, J., concurring in part and concurring in the judgment).

This understanding of Rule 24(a)(2)'s interest requirement has deep roots. By the turn of the last century, this Court found it "well settled" that a party had an enforceable right to intervene only where "the denial of the right * * * would be a practical denial of certain relief to which the intervener [wa]s fairly entitled." *Credits Commutation Co.* v. *United States*, 177 U.S. 311, 315-316 (1900) (internal quotation marks omitted). An interest that was "contingent, speculative," or merely a "future possibility" did not suffice. *Id.* at 315. Similarly, in *Sutphen Estates* v. *United States*, 342 U.S. 19 (1951), the Court indicated that even the early versions of Rule 24(a) required intervenors to possess an inter-

est that was neither "speculative" nor "contingent on unknown factors." *Id.* at 23.

If these requirements sound familiar, that is because they mirror, almost word-for-word, the elements of Article III standing. Article III, too, requires a "legally protected interest" that is "concrete" and non-"conjectural." *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). It likewise demands that the interest be "particularized" to the litigant. *Id.* That requirement is reiterated both in *Donaldson*'s insistence that the taxpayer *himself* have an enforceable "privilege," 400 U.S. at 531, and in Rule 24(a)(2)'s requirement that the intervenor's interest must be "[in]adequately represent[ed]" by others, Fed. R. Civ. P. 24(a)(2). And like Rule 24(a)(2), Article III demands that the possibility of redress not be "speculative." *Lujan*, 504 U.S. at 561 (internal quotation marks omitted).

Given the substantial overlap between the two tests, lower courts have unsurprisingly struggled to articulate any clear difference between the requirements of Article III standing and Rule 24(a)(2). Nearly every circuit has agreed that Rule 24(a)(2) requires an intervenor as of right to claim an interest that is "direct, substantial and legally protectable." *Hawes* v. *Gleicher*, 745 F.3d 1337, 1339 n.5 (11th Cir. 2014) (internal quotation marks omitted).[1] Some

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[1] *See also Int'l Paper Co.* v. *Inhabitants of Town of Jay*, 887 F.2d 338, 342 (1st Cir. 1989); Pet. App. 13a (2d Cir.); *Kleissler* v. *U.S. Forest Serv.*, 157 F.3d 964, 973 (3d Cir. 1998); *NOPSI*, 732 F.2d at 463 (5th Cir.); *Purnell* v. *City of Akron*, 925 F.2d 941, 947 (6th Cir. 1991); *Transamerica Ins. Co.* v. *South*, 125 F.3d 392, 396 n.4 (7th Cir. 1997); *United States* v. *Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 839 (8th Cir. 2009); *S. Cal. Edison Co.* v.

have concluded that this standard is simply coterminous with, if not more demanding than, the criteria for Article III standing. *See S. Christian Leadership Conference* v. *Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984) (per curiam) (noting that *Donaldson*'s "gloss upon" Rule 24(a)(2) is the same as what would be "required by Article III"); *United States* v. *36.96 Acres of Land*, 754 F.2d 855, 859 (7th Cir. 1985) (concluding that "a significantly protectable interest" is "greater than the interest sufficient to satisfy the standing requirement" (internal quotation marks omitted)); *Cotter* v. *Mass. Ass'n of Minority Law Enf't Officers*, 219 F.3d 31, 34 (1st Cir. 2000) (concluding that Rule 24(a)(2)'s " 'interest' requirement" is "almost always" coterminous with Article III). And even those that (wrongly) reject Article III standing as a condition for intervention as of right still consult standing precedents in applying the Rule. *See, e.g.*, *Chiles* v. *Thornburgh*, 865 F.2d 1197, 1212-1213 (11th Cir. 1989) (holding that "standing cases * * * are relevant to help define the type of interest that the intervenor must assert"); *NOPSI*, 732 F.2d at 464-465 (consulting several standing precedents in interpreting Rule 24(a)(2)).

For good reason. Rule 24(a)(2)'s interest requirement has nearly the same aim as Article III's standing rules: To ascertain whether an entity has an interest "appropriate[] to be considered judicially cognizable." *Allen*, 468 U.S. at 752; *cf. Tiffany Fine Arts*, 469 U.S. at 315 (stating that an intervenor's

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Lynch, 307 F.3d 794, 803 (9th Cir. 2002); *Coal. of Ariz./N.M. Ctys. for Stable Econ. Growth* v. *Dep't of Interior*, 100 F.3d 837, 840-841 (10th Cir. 1996).

interest must be "legally protectible"). It therefore makes sense—even putting aside what the Constitution requires—that courts would apply the well-developed, off-the-shelf body of law governing standing in interpreting Rule 24(a)(2), rather than starting from scratch. An intervention-only set of rules to identify sufficient "interests" would inevitably be less predictable for litigants and less uniformly applied across courts. And because there are only so many ways of articulating the same basic cluster of concepts, courts would be likely to fall back on the same set of words ("direct," "concrete," non-"speculative") and the same principles, *see NOPSI*, 732 F.2d at 463-464, to convey the ideas common to both doctrines. It makes far more sense to assume the drafters intended courts to apply a single set of rules in both cases.

B. The Textually Identical Rule 19(a)(1)(B) Requires An Interest Sufficient To Confer Standing.

This reading draws substantial support from Rule 24's context and purpose. The text of Rule 24(a)(2) mirrors almost exactly the language of Rule 19(a)(1)(B), a provision governing mandatory joinder. That Rule states that a court "must" join any person to a suit who "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may *** as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i).

This nearly word-for-word correspondence was not accidental. The drafters of the current version of Rule 24(a)(2) intended it to be "a kind of counterpart

to Rule 19(a)[(1)(B)]." Fed. R. Civ. P. 24(a)(2) advisory committee's note to 1966 amendment.[2] As the drafters explained, their aim was to permit a person whose "position is comparable to that of a person under Rule 19(a)[(1)(B)]" to join a suit of her own accord through intervention. *Id.*

It is all but inconceivable that someone could have an interest sufficient to merit mandatory joinder under Rule 19(a)(1)(B) but nonetheless lack Article III standing. By its terms, Rule 19(a)(1)(B) contemplates the joinder of persons whose interest in a suit is so great that they must be *compelled* to join, even as "involuntary plaintiff[s]," or have the case "dismissed" in their absence. Fed. R. Civ. P. 19(a)(2), (b). Persons with such a significant stake in the outcome of a controversy will almost inevitably satisfy Article III's requirements. Practice suggests as much: In five decades, it is difficult to find a single Rule 19(a)(1)(B) case in which a mandatorily joined party's standing would be seriously open to question. *See, e.g.*, *Ward* v. *Apple, Inc.*, 791 F.3d 1041, 1050-1051 (9th Cir. 2015) (explaining that Rule 19(a)(1)(B) requires "a legally protected interest" that is "more than a financial stake, and more than speculation about a future event").

Accordingly, Rule 24(a)(2)'s "interest" requirement must also demand an interest sufficient to create Article III standing. Rule 24(a)(2)'s text is essentially identical to Rule 19(a)(1)(B)'s, and it was intended to be the joinder rule's counterpart. It would there-

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[2] At the time of the revision, this Rule was codified at Fed. R. Civ. P. 19(a)(2)(i). Its text was materially the same.

fore violate basic canons of statutory interpretation to require two different types of "interest[s]" in applying the two rules. *See, e.g.*, *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 34 (2005) ("[I]dentical words used in different parts of the same statute are generally presumed to have the same meaning."); *United Keetoowah Band of Cherokee Indians of Okla.* v. *United States*, 480 F.3d 1318, 1324 (2007) (holding that "our application of the 'interest' requirement" under one Rule "applies similarly" to the other).

C. Historically, Intervention As Of Right Was Not Granted To Entities That Lacked Standing.

The broader history of Rule 24(a) points in the same direction. Intervention originated as a narrow practice. When the Constitution was written, only persons who could file a formal complaint or who had a direct property interest in the suit could intervene as of right. *See* Bates, *supra*, at 664; Moore & Levi, *supra*, at 569-572.

By the time Congress "codif[ied]" existing doctrines in 1938, *Mo.-Kan. Pipe Line*, 312 U.S. at 508, intervention as of right had not broadened substantially. *See, e.g.*, *Credits Commutation*, 177 U.S. at 316 (holding that much more than a "contingent" or "speculative" interest is required to establish a right to intervene). The original Rule 24(a) permitted intervention as of right only for those who would be "*bound* by a judgment in the action" or "*adversely affected* by a distribution or other disposition of property in the custody of the court or of an officer thereof." Fed. R. Civ. P. 24(a)(2)-(3) (1938) (emphases added); *see* Wright, *supra*, § 1901. There can be no real doubt that a person who could satisfy that

Rule's requirements could also satisfy the requirements of Article III. *Cf. Mo.-Kan. Pipe Line*, 312 U.S. at 508 (holding that the "sole question" in determining a party's right to intervene was whether it had "standing to make [its] claim before the district court"); *Lujan*, 504 U.S. at 561 (explaining that "there is ordinarily little question" that a person who is "himself an object of [government] action" has standing).

In 1966, Rule 24 was amended to enable intervention in certain additional "meritorious cases." Fed. R. Civ. P. 24(a)(2) advisory committee's note to 1966 amendment. In particular, the drafters thought the insistence on a technically binding judgment made it difficult for the "beneficiary of [a] trust" or a "member of a class [action]" to intervene in suits directly deciding their interests. *Id.* And the drafters observed that the requirement that property be in the "custody" of a court was artificial and rarely followed in practice. *Id.*

But these were particularized concerns, focused on narrow deficiencies in the rule. As the Fifth Circuit recognized not long after the amendment, nothing suggested the drafters intended to change "the *kind* of interest necessary" for intervention as of right. *NOPSI*, 732 F.2d at 463; *see* Kaplan, *supra*, at 405 (similar). Certainly nothing suggests the drafters intended to open the door to the array of abstract and speculative interests that lower courts who dispense with standing have permitted. *See, e.g.*, *Jansen* v. *City of Cincinnati*, 904 F.2d 336, 342 (6th Cir. 1990) (permitting intervention based on concern that a decision will be persuasive to another judge); *Yniguez* v. *Arizona*, 939 F.2d 727, 733 (9th Cir. 1991)

(permitting intervention based on status as sponsor of ballot initiative). It is far more likely that the drafters intended to allow only the sort of concrete, well-defined interests that had always been a prerequisite for intervention as of right—the same interests, in other words, necessary to show standing under Article III.

D. Permitting Intervention As Of Right By Persons Who Lack Standing Would Create Improbable Results.

Finally, construing Rule 24(a)(2) to require an "interest" sufficient to confer standing is necessary to prevent several improbable results.

First, if Rule 24(a)(2) did not require Article III standing for intervenors, then dismissing a plaintiff for lack of standing in a multi-plaintiff suit would be an empty gesture. Any plaintiff so dismissed could simply file a motion to intervene under Rule 24(a) and, often as not, reenter the suit as an intervenor—thereby obtaining all of the privileges and all of the powers that she would have possessed as a plaintiff. It defies belief that the drafters of the Federal Rules intended to allow such an obvious end-run around standing limits.

Second, even if one doubts that standing is required at the moment an intervenor enters a case, one may nonetheless be certain that an intervenor cannot demand discovery, file a claim, seek relief, or otherwise invoke the Court's power without standing. *See supra* Part I.B.1. It is inevitable, moreover, that the intervenor will *eventually* do one of these things; that is, after all, the sole purpose of seeking intervention rather than participating as an *amicus*. It would therefore be senseless to require courts to go

through the process of conducting one interest analysis in granting the motion to intervene, only to inevitably conduct an ever-so-slightly different analysis as soon as the intervenor sought to exercise her rights in a particular way. Far better to simply resolve it all up front, when the interest question is already squarely presented to the court.

Third, permitting an intervenor to participate in a district court without standing would have baffling consequences in light of this Court's precedents on an intervenor's right to appeal. *Diamond* bars the initiation of appeals by intervenors without standing. If such parties are nonetheless permitted to intervene as of right in the district court, an intervenor without standing might pour a vast quantity of time and money into a suit in the district court, only to be left in the cold when the parties with standing elect not to appeal an unfavorable judgment. The unlucky intervenor might not even realize the possibility of such an outcome until she tries to appeal, as no standing assessment would have been made at the district court. Further, the intervenor might—as in *Diamond*—be left with an unpleasant souvenir of her fruitless district-court efforts in the form of an order to pay the opposing side's attorney's fees. 476 U.S. at 70.

A rule dispensing with the standing requirement for an intervenor as of right would also be hard to reconcile with this Court's decision in *Stringfellow*, 480 U.S. 370. In that case, after the district court denied an intervenor the right to seek relief or participate in discovery, the intervenor sought an interlocutory appeal, arguing that this restriction was a "collateral order * * * 'effectively unreviewable on

appeal from a final judgment.' " *Id.* at 373, 375 (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)). This Court dismissed the appeal. Because an intervenor generally "ha[s] the same rights of appeal from a final judgment as all other parties," the Court explained, the intervenor could obtain review of the order by asking an appellate court "to vacate the judgment because of [the] erroneous intervention order." *Id.* at 376-377; *see Dig. Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 872 (1994) (reiterating that "restrictions on the rights of intervening parties" may be remedied only "by appellate reversal of a final district court judgment").

This holding is difficult to understand if intervenors are not required to have Article III standing. Only one year earlier, the *Diamond* Court had made clear that intervenors without standing cannot appeal an adverse judgment. 476 U.S. at 69; *see also, e.g.*, *Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2661 (2013). Thus, for intervenors who lack standing, *Stringfellow* works a bait and switch: no immediate appeal because a final appeal is available; no final appeal because standing is lacking. Nor would it be logical to exempt intervenors without standing from *Stringfellow*'s prohibition on interlocutory appeals altogether; then intervenors who lack standing would have *more* rights than intervenors with a cognizable interest in the suit. That cannot be.

Against these various problems, there is no reason to ratchet Rule 24(a)'s limits below the floor set by Article III. As all agree, in the large majority of cases in which lower courts currently grant intervention under Rule 24(a), standing is present. *See* Br. in

Opp. 9-13. Some courts have persisted in granting intervention in a limited but significant set of cases in which Article III's requirements are not met. *See* Cert. Reply Br. 3-4. These cases, however, do not present compelling candidates for intervention: They involve hypothetical litigants worried that a decision may be cited as persuasive authority in a future case, *Jansen*, 904 F.2d at 342; proponents interested in defending legislation they supported, *Yniguez*, 939 F.2d at 733; or legislators with no particularized interest in a case at all, *Ruiz* v. *Estelle*, 161 F.3d 814, 829-830 (5th Cir. 1998). Requiring individuals raising these interests to participate as *amici* would not work any injustice or impair courts' capacity to resolve cases with the full breadth of relevant knowledge regarding a particular issue. It would simply limit party participation to those with a "legally protectible interest" in the case—a sensible result, and one required by Rule 24(a)(2) and Article III alike.

III. REQUIRING THAT INTERVENORS AS OF RIGHT HAVE STANDING BENEFITS COURTS AND LITIGANTS.

The conclusion that intervenors as of right must have standing is more than sufficient to decide this case. The District Court held that Laroe did not have Article III standing. Pet. App. 56a. The Second Circuit did not question that determination and instead held that Article III standing was unnecessary for an intervenor under Rule 24(a). *Id.* at 7a. This Court should hold the opposite, reverse the Second Circuit, and reinstate the denial of Laroe's motion to intervene.

That outcome is not only correct as a matter of law; it is also good policy. The court system and litigants are well served by assessing an intervenor's standing before permitting intervention under Rule 24(a).

1. As the Chief Justice recently observed, "the typical federal [district court] judge has more than 500 cases on the docket." U.S. Supreme Court, *2016 Year-End Report on the Federal Judiciary* 6 (Dec. 31, 2016), https://www.supremecourt.gov/publicinfo/year-end/2016year-endreport.pdf. Each of these cases may require a judge to "resolve[] discovery disputes, manage[] the selection of the jury, rule[] on the admission of evidence, determine[] the proper and understandable instruction of the jury, and resolve[] any issues surrounding the acceptance of the verdict and entry of judgment." *Id.* at 4. That "daunting workload" requires the judge to "be an able administrator in managing the ceaseless stream of cases and issues that pass through the court." *Id.* at 6.

Two key tools in the district court's arsenal are the ability to "narrow a case to a small number of issues truly in dispute" and the authority to prompt the parties to "resolve the matter through settlement" whenever possible. *Id.* at 7. Requiring a court to admit intervenors as of right that lack Article III standing badly blunts those tools.

The presence of additional parties inevitably multiplies the number of issues in dispute and the time it takes to resolve a case. *See, e.g.*, *W.L. Hailey & Co.* v. *Cty. of Niagara*, 388 F.2d 746, 748 (2d Cir. 1967) (intervenors introduced new claims); *Exch. Nat'l Bank of Chi.* v. *Abramson*, 45 F.R.D. 97, 103-104 (D. Minn. 1968) (intervenors introduced new counterclaims); *Grinnell*, 519 F.2d at 596 (intervenors pro-

voked a discovery dispute); *Key Bank of Puget Sound* v. *Alaskan Harvester*, 738 F. Supp. 398, 401 (W.D. Wash. 1989) (intervenors provoked an evidentiary dispute). And more parties at the table makes settlement more difficult. *See, e.g.*, *Indus. Commc'ns & Elecs.* v. *Town of Alton*, 646 F.3d 76, 79 (1st Cir. 2011) (individual intervenors sought to continue suit even though original parties had reached a settlement); *South Carolina*, 558 U.S. at 287-288 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("Intervenors do not come alone—they bring along more issues to decide, more discovery requests, more exceptions to the recommendations of the Special Master. In particular, intervention makes settling a case more difficult * * * .").

These additional burdens on the judicial system and on district court judges in particular are acceptable if they are the price of ensuring that a party with a direct stake in a suit is able to play a role in determining the outcome. *See Valley Forge*, 454 U.S. at 473. Indeed, when an intervenor herself has standing to sue, intervention may ultimately minimize the stresses on the judicial system by allowing for a set of linked claims or defenses to be decided in one suit or one settlement, rather than many. But when an intervenor lacks standing, there is no justification for allowing her to impose these substantial burdens. By definition, an intervenor without standing *lacks* a sufficient stake in the matter to seek judicial relief in her own right. The time and energy she demands from the district court judge come at the expense of the many litigants who do have a vital stake in the intervenor's suit and in the other 500-odd cases on the judge's docket. *See City of Chicago* v. *FEMA*, 660 F.3d 980, 985 (7th Cir. 2011)

(Posner, J.) (without "essential limits on [its] scope," intervention would "clutter too many lawsuits with too many parties").

This waste of precious judicial resources extends beyond the district courts. Appellate courts are often forced to dismiss a case that has already been briefed and argued upon discovering that an intervenor-appellant has no standing. *See, e.g.*, *Associated Builders & Contractors* v. *Perry*, 16 F.3d 688, 689 (6th Cir. 1994). The magnitude of the problem is such that even this Court has been forced to dismiss multiple cases in recent years because the intervenors seeking certiorari did not meet the Article III requirements. *See Wittman* v. *Personhuballah*, 136 S. Ct. 1732, 1737 (2016) (intervenors lacked standing to appeal); *Hollingsworth*, 133 S. Ct. at 2668 (same); *see also Arizonans for Official English*, 520 U.S. at 66 (expressing "grave doubts whether [the intervenors] have standing under Article III to pursue appellate review").

2. Improper intervention also harms rightful litigants in ways beyond its drain on the judicial system. Again, an intervenor's participation increases the burdens placed directly on the original parties in numerous ways. To name just a few: additional discovery requests increase the costs of production; additional motions, additional arguments, and even additional disputes about how to frame the arguments increase the fees paid to the lawyers; and additional timing disputes increase the number of days and hours the litigants must carve out of their lives for the litigation.

These burdens may even become so severe that they interfere with a potential litigant's access to

justice. As this Court has explained, the exorbitant costs of litigation—both financial and otherwise—may dissuade a party from asserting a meritorious claim or defense. *Cf. Coopers & Lybrand*, 437 U.S. at 476 ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."). As a result, this Court has carefully monitored litigation practices like discovery to ensure that they do not become so burdensome that they bar the courtroom doors. *See, e.g., Seattle Times*, 467 U.S. at 36 n.22 (emphasizing "the importance of ensuring that potential litigants have unimpeded access to the courts" when considering the propriety of ordering discovery). These efforts are undercut when intervenors without standing are allowed into a suit. Not only are the costs they impose unnecessary, but they are unpredictable. A potential plaintiff can assess how many parties have a direct stake in an action and estimate costs accordingly. It is much harder for that plaintiff to account for the number of potential individuals with lesser interests who may nevertheless parachute into her case.

Further, there is already a less burdensome means for those third parties to make their lesser interests known to the court: participation as *amici curiae*. When necessary, *amici* have been permitted to file briefs and otherwise apprise the court of concerns and interests the parties might otherwise have overlooked. This limited form of participation ensures that a court fully understands the contours of a controversy. At the same time, because an *amicus*'s participation is tightly limited, the court and the

other parties are spared the extra expense of time, energy, and money imposed by an intervenor as of right in the district court. *See Int'l Union*, 382 U.S. at 209 (contrasting an intervenor with "an amicus [who] is not a 'party' to the case").

While the practice of permitting *amici curiae* is generally not well developed in the district courts, there is no reason courts could not implement it more if any gaps are left by enforcing the Constitution's Article III standing limits on intervention as of right. Alternatively, a district court might allow an interested individual without standing to become a permissive intervenor under Rule 24(b), limiting that individual's rights to ensure that she does not independently invoke the court's authority in any way. *Cf. Stringfellow*, 480 U.S. at 373 (explaining that the district court granted an interested environmental group permissive intervention, but strictly limited its powers within the suit).

Whatever the alternative may be, this case offers a vivid illustration of why courts should not dispense with the Article III standing requirements for intervenors as of right. The underlying suit has already been going on for almost nine years, and had already been around for six years when Laroe first sought to intervene. Laroe has asserted that the current plaintiff, Ms. Sherman, informed Laroe that she lacks an "incentive to move the case forward" and is "unwilling to pursue the takings claim" herself. Pet. App. 13a (internal quotation marks omitted). Yet by permitting Laroe to intervene—despite its inability to identify a cognizable interest in the outcome of the suit—the Second Circuit has further drawn out the litigation. *Id.* at 11a. As a result, more district court

resources will be unnecessarily spent and more Town (and therefore taxpayer) funds gratuitously expended. And, if Sherman and Laroe lose, Laroe will have wasted even more of its money obtaining an unfavorable ruling that it cannot appeal of its own accord. *See Diamond*, 476 U.S. at 69; *Stringfellow*, 480 U.S. at 376-377. That outcome cannot be what the drafters of Article III or the Federal Rules intended.

3. All of this is not to say that our courtrooms are currently overrun with improper intervenors. In fact, most courts of appeals already apply the test for Article III standing or something very similar to it before granting intervention as of right. *See supra* Part II.C.1. Making clear that the Constitution requires that threshold standing inquiry will not work a sea change in litigation practices, or—unfortunately—single handedly relieve the heavy workload of the district courts. But it will ensure that, as our Founders intended, the scarce resources of the judiciary and those who appear before it are spent only "in the last resort, and as a necessity in the determination of real, earnest and vital controversy.' " *Chi. & Grand Trunk Ry.*, 143 U.S. at 345.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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FEBRUARY 2017

...ORD
AND
BRIEFS

No. 16-605

IN THE

Supreme Court of the United States

TOWN OF CHESTER,

Petitioner,

v.

LAROE ESTATES, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

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QUESTION PRESENTED

Whether intervenors participating in a lawsuit as of right under Federal Rule of Civil Procedure 24(a) must have Article III standing, or whether Article III is satisfied so long as there is a valid case or controversy between the named parties.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Laroe Estates, Inc., discloses that it is a privately held corporation that has no parent corporation and no publicly traded stock, and no publicly held company owns more than 10% of its stock.

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INTRODUCTION

Petitioner, the Town of Chester, claims that Article III's case-or-controversy requirement precludes a court from "decid[ing] any question at any point" unless it does so at the behest of a litigant with standing. Pet. Br., 19. That cannot be right.

As part of an existing case or controversy, courts routinely exercise their power on behalf of litigants who are not required to demonstrate standing. Defendants, permissive intervenors, and amici all ask courts to decide questions, large and small, that often impose burdens on other parties. It would make no sense to require courts to ask whether these litigants have standing first.

That is because Article III requires only a "case" or "controversy." Once a plaintiff establishes standing with respect to a particular claim and request for relief, Article III demands no more. "The judicial power shall extend" to that case or controversy. That is, courts are free to adjudicate the claim, award the requested relief, and decide questions that come up along the way. To be sure, those exercises of authority must conform to the Federal Rules. But within a live dispute about a particular claim, Article III does not create additional constitutional constraints on every action a court takes.

For that reason, federal courts, including this one, have recognized repeatedly that Article III is satisfied as long as at least one plaintiff has standing to bring a particular claim and seek a specific form of relief. So long as other parties assert the same claim and seek the same relief, their presence does not negate the case or controversy.

Based on these principles, the Second Circuit correctly recognized that Respondent, Laroe Estates, Inc., is not required to demonstrate independent standing because it brings the same claim and seeks the same relief as a plaintiff whose standing is undisputed. Petitioner's contrary approach invents a constitutional rule that has no basis in the text or purpose of Article III. It contravenes longstanding judicial practice. It forces courts to engage in burdensome, unnecessary constitutional inquiries that will handcuff the judicial power to resolve live cases. And all for no good reason: Petitioner concedes that there is no evidence that "our courtrooms are currently overrun with improper intervenors." Pet. Br., 50. Rule 24 already ensures that only appropriate intervenors participate in litigation, and courts have ample case-management tools to ensure that intervention does not improperly burden other parties. This Court should affirm the decision below.

STATEMENT

A. The Town Prevents Sherman From Developing His Land

In 2000, Steven Sherman applied to the Town of Chester for approval to subdivide a nearly 400-acre property that he purchased for $2.7 million ("MareBrook"). *See Sherman v. Town of Chester*, 752 F.3d 554, 557 (2d Cir. 2014). "That application marked the beginning of his journey through the Town's ever-changing labyrinth of red tape." *Id.*

The Town enacted a new zoning ordinance in 2003 that required Sherman to redraft his development plan. *See id.* Just as Sherman completed his new

proposal, the Town changed its regulations again—a pattern the Town repeated over and over, forcing Sherman to recreate his proposal each time. *See id.* "On top of the shifting sands of zoning regulations, the Town erected even more hurdles," including "announc[ing] a moratorium on development, replac[ing] its officials, and requir[ing] Sherman to resubmit studies that he had already completed." *Id.* Every time Sherman came close to fulfilling the Town's latest requirement, the Town imposed a new one.

B. Running Out Of Money, Sherman Sells His Property To Laroe

After a decade of the Town's obstructionism, Sherman had spent more than $5.5 million. *See Sherman*, 752 F.3d at 557. And there was still "no end in sight." *Id.* Along the way, Sherman turned to Laroe. Laroe and Sherman signed two agreements regarding MareBrook, in 2003 and 2013. Pet. App. 3a-4a. The combined effect of the two agreements was that Laroe purchased MareBrook from Sherman for $2.5 million, subject to a provision requiring Laroe to transfer some lots back to Sherman depending on the number of lots the Town ultimately approved. *See id.*[1]

---

[1] The Town and Sherman suggest that Laroe's purchase was contingent on satisfying a preexisting mortgage on the property held by a bank. *See* Pet. Br., 10; Sherman Amicus Br., 8. But whatever the bank's interest, which the 2013 agreement set forth various ways of satisfying, Laroe bought *Sherman's* interest. *See* Pet. App. 4a. And as between Laroe and Sherman, the parties deemed "the purchase price for the property 'paid in full.'" *Id.*

Importantly, Laroe was not "lend[ing]" Sherman money under these agreements. Sherman Amicus Br., 8. As the Second Circuit recognized, Laroe and Sherman entered into agreements "for the purchase of property." Pet. App. 14a n.3. Laroe "agreed to purchase property from Sherman, prepaid a substantial sum of money, and signed a second agreement with Sherman that deemed the purchase price paid in full." Pet. App. 12a n.2. That second agreement "confirm[ed] [an] [earlier] Arbitration Ruling" that had declared Laroe "the sole owner[] of [MareBrook]." CA2 JA at 233, 239, *Laroe Estates, Inc. v. Town of Chester*, No. 15-1086 (2d Cir. 2016), ECF 22-1. Thus, unlike a lender, "[a]t the end of the day, Laroe did not want to be paid *back*—it wanted the property." Pet. App. 14a n.3.

C. Sherman Sues The Town

Meanwhile, the Town continued to prolong the approval process. That drove Sherman to court, where the Town engaged in even more stalling tactics.

Sherman initially sued the Town in 2008 in federal court, alleging that the Town's repeated amendments of its zoning laws wrongfully prevented him from developing MareBrook and constituted a regulatory taking. As the Second Circuit eventually explained, "[t]he Town unfairly manipulated the litigation of th[at] case." *Sherman*, 752 F.3d at 560, 568-69. The Town moved to dismiss because Sherman had not first requested compensation in state court. *See id.* at 563-64. Sherman voluntarily dismissed his federal case and refiled in state court in January 2012. *See* Pet. App. 21a. But the Town then "removed the case [back to federal court]" and again "moved to dismiss

on the ground that the takings claim must be heard in state court." *Sherman*, 752 F.3d at 564, 569. The Town also argued that Sherman's claim was unripe because the Town had not yet reached a final decision on the development project.

The District Court agreed that the Town had not reached a final decision and dismissed Sherman's regulatory-takings claim as unripe. *See* Pet. App. 23a. Sherman appealed. He passed away while that appeal was pending, and his widow, Nancy J. Sherman, was substituted in the litigation as his personal representative. *See Sherman*, 752 F.3d at 560.

The Second Circuit reversed the dismissal of the takings claim. *See* Pet. App. 24a. It found that "[s]eeking a final decision [from the Town] would be futile" because "the finish line will always be moved just one step away until Sherman collapses." *Sherman*, 752 F.3d at 563. Moreover, Sherman's allegations about the Town's conduct—"singl[ing] out Sherman's development" and "suffocating him with red tape to make sure he could never succeed in developing MareBrook"—were sufficient to state a takings claim. *Id.* at 565.

D. Laroe Moves To Intervene

Twelve days after the Second Circuit remanded the case to the District Court, and before the District Court took up the remand, Laroe notified the District Court of its intention to intervene pursuant to Federal Rule of Civil Procedure 24. *See* JA 4. Laroe moved to intervene as of right under Rule 24(a)(2) and, in the alternative, by permission under Rule 24(b). *See* Pet. App. 10a.

Laroe argued that it had "an interest relating to the property or transaction" because it was the equitable owner of MareBrook. Fed. R. Civ. P. 24(a)(2); *see* JA 138. Laroe further claimed that its interest would be impaired or impeded if it were not allowed to intervene, and that Sherman could not adequately represent its interests. *See* JA 144-45. Finally, Laroe's motion was timely. Laroe first learned about Sherman's lawsuit while the Town's motion to dismiss was pending. *See* JA 141. Laroe attempted to intervene within days of when that motion was finally resolved. *See id.* At that point, "the parties ha[d] not even begun discovery," Pet. App. 12a, and the Town was still two and a half years from answering the complaint, *see* JA 16.

The District Court denied Laroe's motion to intervene. Pet. App. 57a. The court did not decide whether Laroe satisfied the requirements for intervention under Rule 24. *See* Pet. App. 53a-59a & n.20. Instead, it concluded that Laroe's motion was "futile" because its interest under its purchase agreements with Sherman did not give it "standing to bring a takings claim." Pet. App. 57a.

E. The Second Circuit Vacates The District Court's Denial Of Laroe's Intervention Motion

On interlocutory appeal, the Second Circuit vacated the District Court's decision. While Laroe argued that it had standing based on its ownership interest in MareBrook, the Second Circuit never reached that question. It had no need to, because it held instead that a party seeking to intervene as of right to pursue the same claim and relief as an

existing plaintiff is not required to "independently have standing" in the first place. Pet. App. 6a.

"[T]he question of standing in the federal courts is to be considered in the framework of Article III, which restricts judicial powers to cases and controversies." *Id.* Because "the existence of a case or controversy has been established in the underlying litigation," the Second Circuit explained that "there is no need to impose the standing requirement upon a proposed intervenor." Pet. App. 7a. The court noted that this Court "has *sub silentio* permitted parties to intervene in cases that satisfy the 'case or controversy' requirement without determining whether those parties independently have standing." Pet. App. 8a (discussing *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010)). The Second Circuit also explained that its approach "accords with that of the majority ... [of] sister circuits that have addressed this issue." Pet. App. 7a. For all these reasons, the court held that "[t]he District Court ... erred by denying Laroe's motion to intervene based on its failure to show it had Article III standing." Pet. App. 8a-9a.

Because an intervenor seeking the same relief as a plaintiff need not possess Article III standing, "the District Court should have instead focused its analysis on the requirements of Rule 24." Pet. App. 10a. The Second Circuit concluded that "the factual record before [it] [was] insufficiently developed at this stage to allow [it] to confidently resolve [the parties'] arguments" regarding Rule 24. Pet. App. 11a. It therefore remanded the case to the District

Court "to determine in the first instance if Laroe satisfies the requirements of Rule 24." *Id.*

SUMMARY OF ARGUMENT

The Second Circuit correctly held that there is no need to ask whether Laroe has independent standing because Laroe asserts the same claims and seeks the same relief as Sherman, whose standing is undisputed. The Town argues that Article III nevertheless requires courts to engage in potentially complicated standing inquiries whenever *any* litigant asks a court to decide "*any* question at *any* point." Pet. Br., 19 (emphasis added). Not even the United States—the Town's own amicus—agrees with that approach. And all relevant authority, settled practice, and common sense refute it.

I. Article III limits the exercise of judicial power to "cases" and "controversies." U.S. Const. art. III, § 2. The Framers cabined judicial power in this way to prevent courts from encroaching upon the Legislative or Executive Branches by opining on legal issues that do not warrant judicial intervention. Justiciability doctrines, including standing, give meaning to these limits. Standing doctrine requires a plaintiff to show, as to each claim and form of relief, that he has an actual injury that is traceable to the defendant's conduct and that is redressable by a favorable judicial decision. Only then is there a case or controversy that warrants the exercise of judicial power.

Once Article III is satisfied, it does not restrict the exercise of judicial power within the contours of a case or controversy. Nor does it limit the parties who may participate in that case or controversy. Indeed,

this Court and lower courts have long recognized that there is a justiciable case or controversy when at least one plaintiff has standing for each claim and form of relief. Additional plaintiffs who pursue the same claims and relief do not affect the existence of a case or controversy. There is accordingly no need to analyze whether those other plaintiffs have Article III standing. And these same settled principles apply equally to intervenors.

There are good reasons to allow intervenors to ride piggyback on an existing party's standing. Doing so enables courts to avoid deciding the complex and unnecessary constitutional questions that inquiring into every party's standing would entail. At the same time, it promotes the expeditious resolution of related claims. It also respects the difference between mobilizing the judicial machinery in the first instance and participating in a case after the judiciary has already been properly engaged. And it achieves all of this without creating undue burdens for courts or litigants. Courts have ample case-management tools to ensure the efficiency of multiparty litigation.

II. The Town argues that Article III nevertheless requires courts to engage in potentially complicated standing inquiries whenever *any* litigant asks a court to decide "*any* question at *any* point." Pet. Br., 19 (emphasis added). Longstanding practice repudiates that approach.

Courts regularly exercise their power on behalf of litigants who participate in an existing case or controversy, but who are not required to demonstrate independent standing. Take, for example, defendants. It would be nonsensical to demand that

they establish standing before pursuing discovery, issuing subpoenas, or making motions. Indeed, the standing inquiry—which focuses on the party invoking federal jurisdiction to bring a claim—cannot logically be applied to a defendant, who is haled into court involuntarily.

Permissive intervenors, too, take discovery, file motions and briefs, and participate at oral argument. They do so because they become parties to the suit. Rule 24(b), however, does not require permissive intervenors to have a direct interest in the subject of the litigation, as this Court has recognized. The Town's theory would render all of this conduct by permissive intervenors unconstitutional. The Town suggests that courts can cure these constitutional concerns by relegating permissive intervenors to the role of amici. Not only is that contrary to settled practice, but even amicus participation may be unconstitutional under the Town's approach. Amici regularly ask courts to decide questions, consider arguments, and enter orders—all, in the Town's view, invocations of judicial power that are impermissible without standing.

III. Without any constitutional basis to impose Article III's standing criteria on intervenors, the Town and the United States argue that Rule 24(a)(2) *itself* requires standing. In petitioning for certiorari, however, the Town emphasized that Article III's requirements are separate from what Rule 24(a)(2) requires. Indeed, the Town disclaimed reliance on Rule 24(a)(2)'s language. It argued that this case was a particularly good vehicle to decide Article III's threshold requirements because the requirements of

Rule 24(a)(2), which the Second Circuit did not expressly address, are not at issue.

In any event, Rule 24(a)(2) does not incorporate Article III's case-or-controversy requirement. Rule 24(a)(2) asks a different question than Article III. Standing requires an actual injury that is *certainly impending*, traceable to the defendant's conduct, and redressable by the court. Rule 24(a)(2) requires only an interest that *may* be impaired or impeded in the future. Moreover, Rule 24(a)(2) is satisfied if the intervenor's interest *relates to the subject matter of the action*; the interest need not have been harmed *by the defendant's conduct*. And Rule 24(a)(2) focuses on whether intervention might aid the movant's ability to protect its interest *as a practical matter*—not on the tight redressability nexus required by standing doctrine. Rule 24's history confirms that it has an expansive, practical purpose that is incompatible with the exacting requirements of standing. Once Article III has ensured that there is an appropriate case or controversy for judicial resolution, Rule 24 allows potentially affected parties to participate in that existing case to protect their interests and avoid multiplicitous litigation later.

IV. Neither the Constitution nor Rule 24 requires courts to assess the independent standing of intervenors who pursue the same claims and relief as an existing plaintiff, as Laroe does here.

ARGUMENT

I. ARTICLE III EMPOWERS A COURT TO ADJUDICATE A CLAIM AND ISSUE RELIEF THAT AT LEAST ONE PARTY HAS STANDING TO PURSUE

Article III limits the exercise of the judicial power to "cases" and "controversies." U.S. Const. art. III, § 2. That restriction confines the Judicial Branch to its proper role in the tripartite system of government. The Framers did not want courts to be roving arbiters of the actions of the legislature, the Executive, or private parties, in the absence of a live dispute that required judicial intervention.

This Court and others have long recognized that Article III's case-or-controversy requirement is satisfied when at least one plaintiff has standing to assert a claim and seek particular relief. The presence of other parties who pursue the same claim and relief does not implicate Article III's core concern because the court already has authority to resolve that same case or controversy. The Town's own amicus, the United States, agrees that all of these principles are well settled and that they apply with equal force to intervenors.

These principles also make sense. The participation of an additional litigant does not negate the case or controversy as to a particular claim. To the contrary, Article III provides that the "judicial power" "extends" to the entire "case" or "controversy." Moreover, allowing intervenors to piggyback on an existing party's standing avoids "burden[ing] already busy courts with an inquiry that could appropriately be left unaddressed in accordance with ordinary

principles of constitutional avoidance." U.S. Amicus Br., 16. At the same time, courts have ample case-management tools to ensure that intervenors do not create undue burdens for the court or existing parties.

A. Article III's Case-Or-Controversy Requirement Protects The Political Branches From Judicial Encroachment

1. Article III ensures that federal courts exercise the "judicial power" only to resolve "cases" and "controversies." U.S. Const. art. III, § 2. This restriction "state[s] fundamental limits on federal judicial power in our system of government." *Allen v. Wright*, 468 U.S. 737, 750 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

Article III's case-or-controversy requirement ensures that "the judiciary remains truly distinct from both the legislature and the Executive." *The Federalist No. 78* (Hamilton) (The Avalon Project at Yale Law School) (McLean's ed.). "The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers," and they were acutely aware of the "factional strife and partisan oppression" that such a system produced. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995). The Framers accordingly believed that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." *The Federalist No. 78, supra.* This concern applies to claims against the government: After all, if courts had "an unconditioned authority to determine the constitutionality of legislative or executive acts," they

could easily usurp the political branches. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). And it applies to disputes among private parties, whether they "aris[e] under ... [the] laws of the United States," or involve citizens of different states. U.S. Const. art. III, § 2. Indeed, unwarranted federal-court intervention in state-law claims implicates not only the proper role of courts, but also the delicate balance between state and federal governments.

The case-or-controversy requirement addresses these concerns. It limits the federal judicial power to situations where its exercise is "a necessity in the determination of real, earnest and vital controversy." *Valley Forge*, 454 U.S. at 471. That, in turn, prevents courts from opining at will on "questions of political power, of sovereignty, [and] of government," or otherwise "assum[ing] a position of authority over the governmental acts of another and coequal department." *Massachusetts v. Mellon*, 262 U.S. 447, 485, 489 (1923). In short, "the 'case' or 'controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Allen*, 468 U.S. at 750.

2. While the case-or-controversy requirement limits when judicial power may be engaged, it does not impose a straightjacket on the precise manner in which the judiciary manages resolution of actual controversies. Such micromanagement of housekeeping matters is unnecessary to prevent courts from unduly encroaching upon the political branches, the principal objective of Article III. That

end is fully served by requiring a live dispute with respect to each legal claim and request for relief. *See Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996); *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983).

But once there is a case or controversy, "[t]he judicial power ... extend[s]" to all of it. U.S. Const. art. III, § 2. Courts have authority to adjudicate the claim, award the requested relief, and resolve questions that arise along the way. This makes sense: Ancillary case-management questions were not the impetus for Article III's restrictions on judicial power, and are not likely to implicate the core functions of the political branches in the same way as adjudicating claims or granting relief.

To be sure, a case or controversy as to one claim does not extend the judicial power to *different* claims or forms of relief. *See Lewis*, 518 U.S. at 358 n.6; *Lyons*, 461 U.S. at 109. It would work an end run around the core concern of Article III if a party could bootstrap one claim to procure judicial resolution of another, without ensuring that it, too, is an appropriate case or controversy. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006). But contrary to the Town's suggestions (*see, e.g.*, Pet. Br., 18-19), cases recognizing this principle do not suggest that Article III imposes any limit on how far "[t]he judicial power ... extend[s]" *within* a case or controversy. U.S. Const. art. III, § 2.[2]

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[2] The Town's reliance on *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988), is misplaced. That case holds merely that a court cannot act *at all*, including as to discovery disputes, in the absence of an underlying case or controversy. *See id.* at 76, 80.

3. Courts have developed justiciability doctrines to ensure that there is a live dispute warranting their intervention with respect to a particular claim or request for relief. Standing doctrine identifies the types of "disputes which are appropriately resolved through the judicial process." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). And ripeness and mootness doctrines ensure that courts do not intervene too soon (if the dispute is not ripe) or too late (if the dispute is moot). *See, e.g.*, *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (per curiam); *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967).

To establish standing, a plaintiff must show that he "suffered an injury in fact," "that is fairly traceable to the challenged conduct of the defendant," and "that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). These criteria advance Article III's purposes. When a litigant has an "actual injury redressable by the court," that "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge*, 454 U.S. at 472. By contrast, if a plaintiff has not been injured, if his injury is not traceable to the defendant's conduct, or if a favorable court decision would not redress it, there is no "real, earnest and vital controversy" that makes judicial intervention "a necessity." *Id.* at 471. "[A]llowing courts to oversee legislative or executive action [under those circumstances] would significantly alter the allocation of power away from a democratic form of government." *Summers v. Earth Island Inst.*, 555

U.S. 488, 493 (2009). That, in turn, would give rise to the sort of "unconditioned authority" to opine on legislative or Executive acts that the Framers sought to avoid. *Valley Forge*, 454 U.S. at 471.

The threshold requirement of standing accordingly prevents federal courts from deciding claims or granting relief that they would not otherwise have authority to consider. *See DaimlerChrysler*, 547 U.S. at 353; *see, e.g.*, *Lewis*, 518 U.S. at 349 ("[S]tanding ... prevents courts of law from undertaking tasks assigned to the political branches[.]"). When a plaintiff has standing, however, these concerns abate. In the words of a leading scholar on this topic, it is then appropriate to "mobilize the judicial machinery." David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 726 (1968).

B. Courts Have Long Held That Article III Is Satisfied If One Plaintiff Has Standing To Pursue A Particular Claim And Form Of Relief

For decades, this Court and others have recognized that there is an Article III case or controversy warranting the exercise of judicial power when at least one plaintiff has standing to bring a particular claim and seek particular relief. Article III therefore does not require courts to consider the standing of additional plaintiffs who pursue the same claim and relief. These principles apply equally to intervenors. *See infra* 24-27.

1. As explained above, "the tripartite allocation of power that Article III is designed to maintain would

quickly erode" if a plaintiff could invoke the judicial power to resolve one claim by establishing standing as to a different claim. *DaimlerChrysler*, 547 U.S. at 353. But this same concern is not implicated when multiple plaintiffs pursue an identical claim and relief. As long as one plaintiff has standing to do so, an Article III case or controversy exists. The court therefore "acts within the limits prescribed by the Constitution" by adjudicating that claim. U.S. Amicus Br., 15.

Other plaintiffs can participate in that same case or controversy without overstepping the bounds of Article III because the underlying claim and relief remain appropriate for judicial intervention. *Cf. Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005) (recognizing that multiple plaintiffs' claims can be "part of the same Article III case or controversy"). As long as the additional plaintiffs do not pursue additional claims or relief—by, for example, seeking a broader injunction or seeking monetary damages on top of those alleged by the plaintiff with standing—their presence "does not negate the requisite adversity" or "the existence of an Article III 'Case' or 'Controversy.'" U.S. Amicus Br., 15.

2. Scores of decisions from this Court and lower federal courts confirm these settled principles.

a. This Court has recognized repeatedly that "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006); *see also Dir., Office of Workers' Comp. Programs v. Perini N. River Assocs.*,

459 U.S. 297, 305 (1983). Thus, upon finding that at least one party "has demonstrated standing" with respect to a particular claim, this Court generally does not consider whether other parties have standing to assert the same claim. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977).[3]

These cases do more than just confirm the Court's ability to "decide a question presented" or "a particular issue." Pet. Br., 32 (emphasis deleted). This Court has repeatedly *affirmed judgments that awarded relief* to parties whose standing the Court declined to consider. *Department of Commerce*, for example, affirmed an order granting summary judgment and injunctive relief to a group of plaintiffs who challenged the legality of a Census Bureau plan—without considering the standing of every

[3] *See also, e.g.*, *Horne v. Flores*, 557 U.S. 433, 446 (2009); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189 n.7 (2008) (plurality op.); *Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007); *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 826 n.1, (2002); *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330 (1999); *Clinton v. City of N.Y.*, 524 U.S. 417, 431 n.19 (1998); *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 719 (1990); *Bowen v. Kendrick*, 487 U.S. 589, 620 n.15 (1988); *Pennell v. City of San Jose*, 485 U.S. 1, 8 n.4 (1988); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 402 n.22 (1982); *Watt v. Energy Action Educational Found.*, 454 U.S. 151, 160 (1981); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 299 n.11 (1979); *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 72 n.16 (1978); *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 377 n.14 (1978); *Carey v. Population Servs., Int'l*, 431 U.S. 678, 682 & n.2 (1977); *Whalen v. Roe*, 429 U.S. 589, 595 n.14 (1977); *Buckley v. Valeo*, 424 U.S. 1, 12 (1976) (per curiam).

plaintiff who secured that victory. *See* 525 U.S. at 327, 330, 334; *see also, e.g.*, *Clinton*, 524 U.S. at 431 n.19, 449 (affirming judgment for group of plaintiffs without determining that each of them had standing); *Bowsher*, 478 U.S. at 719, 721, 736; *Carey*, 431 U.S. at 681-82 & n.2. If Article III required each *party* to establish standing before requesting relief from a court (*see, e.g.*, Pet. Br., 13), this Court could not have affirmed those judgments without assuring itself that every plaintiff had standing. *See infra* 39-40; *cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) ("Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review[.]").

b. Countless decisions from the Courts of Appeals also recognize that "[t]he law is abundantly clear that so long as at least one plaintiff has standing to raise each claim[,] ... [a court] need not address whether the remaining plaintiffs have standing." *Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1243 (11th Cir. 2011), *aff'd in part, Nat'l Fed. Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).[4] And like this Court, many of those courts

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[4] *See, e.g.*, *Tierney v. Advocate Health & Hosps. Corp.*, 797 F.3d 449, 451 (7th Cir. 2015); *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 471 (5th Cir. 2014); *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 316 n.7 (4th Cir. 2013); *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 29 n.1 (10th Cir. 2013); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 84 n.2 (2d Cir. 2012); *In re Navy Chaplaincy*, 697 F.3d 1171, 1178 (D.C. Cir. 2012); *Lozano v. City of Hazleton*, 620 F.3d 170, 182-83 (3d Cir. 2010); *Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 261 (6th Cir. 2009) (en banc); *Washington Legal*

affirm relief awarded to plaintiffs without considering their standing. *See, e.g.*, *Lozano*, 620 F.3d at 176, 182-83; *Glassroth v. Moore*, 335 F.3d 1282, 1284, 1293 (11th Cir. 2003); *Brennan*, 608 F.3d at 1334, 1344; *cf. Hardaway v. D.C. Housing Auth.*, 843 F.3d 973, 979 (D.C. Cir. 2016) (co-plaintiffs could proceed on their claims, including those seeking monetary relief, because at least one of them had standing).

c. District courts, too, repeatedly assure themselves of the standing of only one plaintiff at the outset of litigation—even though additional plaintiffs may participate in discovery or otherwise "impose burdens on other parties." Pet. Br., 20.[5]

(continued...)

Found. v. Massachusetts Bar Found., 993 F.2d 962, 972 (1st Cir. 1993); *Nat'l Wildlife Fed'n v. Agric. Stabilization & Conservation Serv.*, 955 F.2d 1199, 1203 (8th Cir. 1992); *Legal Aid Soc'y v. Brennan*, 608 F.2d 1319, 1334 (9th Cir. 1979).

[5] *See, e.g.*, *Juliana v. United States*, No. 6:15-cv-01517, 2016 WL 6661146, at *14 n.5 (D. Or. Nov. 10, 2016); *Citizens of Karst, Inc. v. U.S. Army Corps of Eng'rs*, 160 F. Supp. 3d 451, 458 (D.P.R. 2016); *ImagePoint, Inc. v. JPMorgan Chase Bank, Nat'l Ass'n*, 27 F. Supp. 3d 494, 514 n.8 (S.D.N.Y. 2014); *North Dakota v. Heydinger*, 15 F. Supp. 3d 891, 906 n.8 (D. Minn. 2014); *Harman v. Ahern*, No. 14-cv-03051, 2014 WL 5209205, at *2 (N.D. Cal. Oct. 14, 2014); *Ctr. for Biological Diversity v. Salazar*, 791 F. Supp. 2d 687, 700 (D. Ariz. 2011); *Women's Med. Prof'l Corp. v. Taft*, 114 F. Supp. 2d 664, 668 (S.D. Ohio 2000); *PSINet, Inc. v. Chapman*, 108 F. Supp. 2d 611, 619-20 (W.D. Va. 2000); *Hoohuli v. Ariyoshi*, 631 F. Supp. 1153, 1157 & n.19 (D. Haw. 1986); *Georgia Socialist Workers Party v. Fortson*, 315 F. Supp. 1035, 1037 (N.D. Ga. 1970).

In some such cases, additional plaintiffs seek the same declaratory or injunctive relief as an existing party. In others, the plaintiffs all seek a single damages award (i.e., the additional plaintiffs do not seek any damages on top of those sought by the party with standing). To discuss just one example, in *Archer v. Gipson*, 108 F. Supp. 3d 895 (E.D. Cal. 2015), a husband and wife sued a city for seizing their property. Only the wife held title to the property, and the city argued that the husband "lack[ed] standing to bring th[e] action because he [wa]s not the property owner of record and he ha[d] no community property interest to confer standing." *Id.* at 906. Explaining that the wife "unquestionably" had standing and that the husband's presence in the suit would not affect "the potential relief in the case," the court allowed the unlawful-seizure claim to proceed to trial without considering the husband's standing. *See id.* at 906-07, 916. Both plaintiffs participated in discovery, *see, e.g.*, Mid-Discovery Status Report, *Gipson*, No. 1:12-cv-00261, ECF 64, and they ultimately recovered compensatory damages for their single injury, *see Archer v. Gipson*, No. 1:12-cv-00261, 2015 WL 9473409, at *1 (E.D. Cal. Dec. 28, 2015). *See also, e.g., Brown Jordan Int'l, Inc. v. Carmicle*, No. 14-cv-60629, 2014 WL 11350232, at *1 (S.D. Fla. Aug. 29, 2014) (applying one-plaintiff rule where multiple plaintiffs sought single damages award for indivisible injury).

3. Cases cited by the Town in which courts have dismissed some, but not all, plaintiffs for lack of standing typically involve dismissed parties who raised distinct claims that *no plaintiff* had standing to bring. *See* Pet. Br., 19-20.

For instance, *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), affirmed the dismissal of two plaintiffs who sought not only the same declaratory and injunctive relief as parties with standing, but also their own individualized monetary damages. *See id.* at 95, 112 n.25, 115; *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 371 (1982) (dismissed plaintiffs sought individualized damages in addition to injunctive and declaratory relief). And in *Nunez Colon v. Toledo-Davila*, 648 F.3d 15 (1st Cir. 2011), the dismissed plaintiffs sought their own damages—of more than $12.5 million each—on top of those alleged by a plaintiff with standing. *See id.* at 18; Amended Complaint, *Nunez Colon v. Toledo-Davila*, No. 06-2060 (D.P.R.), 2007 WL 1339912. In those situations, adjudicating the additional claims or granting relief beyond that requested by a plaintiff with standing would overstep the bounds of Article III. *See DaimlerChrysler*, 547 U.S. at 353; *Lewis*, 518 U.S. at 358 n.6.

By contrast, it does not destroy an existing case or controversy for multiple parties to seek the same injunctive relief or a single damages award for an indivisible injury. While stray courts have dismissed plaintiffs under those circumstances, Article III does not *require* them to do so, or even speak to the issue at all. *Cf. United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725-26 (1966) (federal courts have "power" to exercise supplemental jurisdiction but need not do so in every case). And although courts have broad authority to manage the cases before them, they should avoid unnecessarily resolving constitutional questions about standing. *See infra* 27-28; *see also* U.S. Amicus Br., 16.

C. These Same Principles Apply To Intervenors

The Town concedes that "[t]here is no difference between a plaintiff and an '*intervenor*-plaintiff' that would justify a constitutional constraint on one but not the other." Pet. Br., 5. So does the United States. *See* U.S. Amicus Br., 16. A court need not evaluate the standing of intervenors any more than that of additional plaintiffs who raise the same claims and seek the same relief as a plaintiff with standing.

1. This Court has already recognized an intervenor's "ability to ride 'piggyback'" on a party's standing. *Diamond v. Charles*, 476 U.S. 54, 64 (1986). *Diamond* involved a constitutional challenge to an Illinois abortion law. *See id.* at 56. Shortly after plaintiffs—four physicians who provided abortion services in Illinois—filed their complaint against the State, Diamond sought to intervene to defend the statute. *See id.* at 57-58. The district court allowed him to intervene and, later, granted plaintiffs' request for injunctive relief. *See id.* at 58, 61. After the Seventh Circuit affirmed the district court's judgment, the State did not seek further review. *See id.* at 61. Diamond did, but in the State's absence, "there [was] no case for [him] to join." *Id.* Because Diamond lacked appellate standing, this Court dismissed the appeal for lack of jurisdiction. *See id.* at 64-71.

In doing so, the Court explained that, "[h]ad the State of Illinois invoked this Court's appellate jurisdiction ... and sought review of the Court of Appeals' decision," Article III's "'case' or 'controversy'

requirement would have been met." *Id.* at 62. Diamond then could have "rid[den] 'piggyback' on the State's undoubted standing" and participated like any other party: He would have been "entitled to seek review," "file a brief on the merits," and "seek leave to argue orally." *Id.* at 64.[6]

McConnell confirmed these principles. A group of elected officials intervened as of right to defend the constitutionality of the Bipartisan Campaign Reform Act of 2002, 116 Stat. 81. *See* 540 U.S. at 160, 233. Some plaintiffs argued that intervention was improper and "must be reversed" because the intervenors "lack[ed] Article III standing." *Id.* at 233. But the intervenors' "position," *McConnell* explained, was "identical to the [Federal Election Commission's]"—a party that "clear[ly] ... ha[d] standing." *Id.* Relying on decisions applying the settled rule that only one plaintiff needs standing, the Court concluded that it "need not address the [intervenors'] standing." *Id.* (citing *Clinton*, 524 U.S. at 431-32 n.19; *Bowsher*, 476 U.S. at 721). *McConnell*

[6] The Town claims that *Diamond* did not decide whether intervenors require standing to intervene in district court. *See* Pet. Br., 31. But *Diamond*'s logic with respect to appellate standing applies equally to intervention in the district court. The Town also claims that *Diamond* merely recognized that intervenors can participate in the same capacity as amici. *Id.* But the Court recognized that Diamond would have been "entitled to seek review" and "to file a brief on the merits." *Diamond*, 476 U.S. at 64. As an intervenor with party status, he would also have been entitled to participate in any settlement negotiations. And if his arguments had ultimately persuaded the Court, he would have obtained relief from the attorney's fees assessed against him. *See id.* at 70-71. Amici have none of these rights—in the district court or on appeal.

thus affirmed the district court judgment that the intervenors had helped secure. *See id.*; *see also Triplett*, 494 U.S. at 719 ("Since the [plaintiff] has standing, we need not inquire whether the [intervenor] does as well.").

2. In other contexts, too, this Court has recognized that parties may intervene even when they could not have initiated a separate lawsuit.

First, in *Arizona v. California*, 460 U.S. 605 (1983), the Court allowed several Indian tribes to intervene in an original action involving a water-rights dispute among states and the federal government. The Eleventh Amendment barred the tribes from bringing their claims against the States in a separate proceeding. *See id.* at 614. But there was already an existing case or controversy as to those claims because the United States had asserted identical claims against the States. *See id.* Because the tribes "d[id] not seek to bring *new* claims or issues against the States," the Court determined that its "judicial power over [the existing] controversy [was] not enlarged by granting leave to intervene." *Id.* (emphasis added).

Second, in *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972), a union member sought to intervene in a case involving violations of the Labor Management and Reporting and Disclosure Act of 1959 (LMRDA), 73 Stat. 534, 29 U.S.C. § 482(b). Although the LMRDA barred him from initiating his own suit, the Court held that he could intervene in an existing suit by the Secretary of Labor that was "plainly authorized by the statute." *Trbovich*, 404 U.S. at 531, 537. The LMRDA's

"provision for exclusive enforcement by the Secretary," *Trbovich* explained, was "a device for eliminating frivolous complaints and consolidating meritorious ones." *Id.* at 535. But that did not bar a union member from "participat[ing] in a pending suit" by the Secretary. *Id.* at 531. Because the Secretary had already brought suit, allowing the union member to pursue the same "claims of illegality presented by the Secretary's complaint" would not give rise to a frivolous suit or subject the defendant "to burdensome multiple litigation." *Id.* at 536-37. *Trbovich* accordingly allowed the union member to intervene as of right under Rule 24(a)(2) "to present evidence [in district court] and argument in support of the Secretary's complaint." *Id.* at 537.

The principles in *Arizona* and *Trbovich* support intervention by those who raise the same claims that are already properly raised by a party with standing. Whether or not Article III would permit the intervenor to bring those claims in a separate suit, the "judicial power" is not "enlarged" by allowing him to raise them in the context of an existing case or controversy. *See Arizona*, 460 U.S. at 614.

D. Allowing Intervenors To Piggyback On An Existing Party's Standing Makes Sense

There are good reasons to allow additional parties, including intervenors, to present the same claims and seek the same relief as parties that have already demonstrated standing.

First, courts should avoid passing unnecessarily on constitutional issues. *See, e.g.*, *Camreta v. Greene*, 563 U.S. 692, 705 (2011). Because "the presence of

one party with standing is sufficient to satisfy Article III's case-or-controversy requirement," *Rumsfeld*, 547 U.S. at 52 n.2, there is no constitutional need for courts to decide whether additional parties have standing to raise that same claim. *See supra* 13-27; U.S. Amicus Br., 15-16. "[L]ongstanding principle[s] of judicial restraint" counsel in favor of "leav[ing] [the] issue for another day," if and when the additional party brings a separate claim or seeks additional relief. *Camreta*, 563 U.S. at 705-06.

To be sure, an intervenor who raises new claims or seeks relief beyond that requested by a party with standing must satisfy Article III.[7] *See supra* 15. Nothing is gained, however, from requiring all intervenors to demonstrate standing at the threshold. *See* Pet. Br., 41-42; U.S. Amicus Br., 22-23. Intervenors will not necessarily raise new claims or seek new forms of relief as a case progresses.[8] They will bring their own perspective, make arguments,

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[7] For that reason, the Second Circuit's decision does not create an "end-run around" Article III. *See* Pet. Br., 41. Additional plaintiffs and intervenors stand on the same footing: They can piggyback on an existing party's standing only if they raise the same claims and seek no additional relief.

[8] The Town claims that a litigant who shows that "existing parties" do not "adequately represent" his interest "will necessarily ask a court to exercise its authority in a way different than the original parties." Pet. Br., 29; *see also* U.S. Amicus Br., 8. Not so. An intervenor whose pleading is limited to the same claims and relief as an existing party does not change the direction of a case in a constitutionally relevant way. Indeed, amici also have an "interest" that they believe is not adequately represented, *see* Fed. R. App. P. 29(4)(D), but they do not ask the court to exercise its authority in ways that implicate Article III, as properly understood.

and possibly present evidence—but all with respect to the claims they raise in their initial pleading. *See* Fed. R. Civ. P. 24(c). And if intervenors later seek to raise new claims or request additional relief, they likely would do so just as any other party would: through an amended pleading. The court may need to conduct a standing analysis at *that* point. But a determination that an intervenor has Article III standing to assert the claims raised in its initial pleading says nothing about whether it has standing to raise *different* claims later. A threshold standing requirement would therefore be both premature and pointless.[9]

Second, requiring a court to inquire into every party's standing would waste judicial resources. *See* U.S. Amicus Br., 16. A party's standing "often turns on imprecise distinctions and requires difficult line-drawing." *Campbell v. Louisiana*, 523 U.S. 392, 397 (1998). Standing determinations can entail additional discovery, briefing, and evidentiary hearings. *See, e.g.*, *Friends of Tims Ford v. Tennessee*

[9] Rejecting such a requirement does not work a "bait and switch" for intervenors who are "left in the cold when the parties with standing elect not to appeal an unfavorable judgment." Pet. Br., 42-43. That is a risk that intervenors assume when they piggyback on someone else's standing—just like the risk that the named parties will settle the underlying dispute or that a party with standing will voluntarily dismiss his claims. *Cf.* Mot. of Sherman for Reconsideration at 2, No. 16-605 (Mar. 9, 2017). *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987), which recognized that intervenors have a right to appeal conditions on their intervention following final judgment, is not to the contrary. *See id.* at 375-76. If an intervenor lacks standing, he has no guarantee of an ongoing case or controversy from which to appeal.

Valley Auth., 585 F.3d 955, 965-66 (6th Cir. 2009). And because a federal court needs to assure itself that there is standing throughout the life of a case, *see, e.g.*, *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013), already overburdened judges may need to repeat this process many times over.

Even after district courts resolve questions of standing, their decisions routinely generate appeals that, in turn, may precipitate remands. *See, e.g.*, *Susan B. Anthony List*, 134 S. Ct. at 2340-41, 2347; *Schnitzler v. United States*, 761 F.3d 33, 35 (D.C. Cir. 2014). Moreover, appellate courts have an independent obligation "to satisfy [themselves] not only of [their] own jurisdiction, but also that of the lower courts in a cause under review, even [if] the parties are prepared to concede it." *Steel Co.*, 523 U.S. at 95; *see also Renne v. Geary*, 501 U.S. 312, 316 (1991) ("We presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record."). The far simpler approach is to permit courts to bypass these questions unless an intervenor seeks to interject new claims or requests additional relief.

Third, a rule allowing intervenors to piggyback on the standing of an existing party allows related claims to be decided together. Even the Town acknowledges that "intervention may ultimately minimize the stresses on the judicial system by allowing for a set of linked claims or defenses to be decided in one suit or one settlement, rather than many." Pet. Br., 46. That is true even if an intervenor lacks standing to bring a separate suit. An interest that does not currently rise to an "actual injury" may ripen into one later, leading to

multiplicitous litigation. *See infra* 43-44 (discussing difference between interest and actual injury). Worse yet, the disposition of the earlier action may have irreparably impaired the intervenor's interest—thwarting the very purposes of intervention. *See infra* 49-51.

Fourth, this rule respects the critical difference between initiating a lawsuit and joining one that already exists. From a constitutional standpoint, initiating litigation triggers concerns at the heart of Article III about courts opining at will on the actions of the political branches. But once there is a valid case or controversy that warrants judicial intervention, allowing additional parties to participate in that same case or controversy does not create these same problems. *See supra* 17-27; *see also* U.S. Amicus Br., 15-16.

There is also a practical difference between initiating litigation and intervening in an ongoing suit. *See* Shapiro, *supra*, at 726-29. "The principal intrusion on [a party's] affairs" occurs when it is "summoned into court." *Trbovich*, 404 U.S. at 536. Allowing an intervenor to join that suit, even to "present evidence," subjects the existing parties "to relatively little additional burden." *Id.* And because an intervenor cannot raise new claims or seek additional relief without satisfying Article III, intervention will not "compel [an opposing party] to respond to a new and potentially groundless suit." *Id.* Indeed, intervention will often protect a party from "burdensome multiple litigation." *Id.*

Finally, allowing intervenors to raise claims or request relief within the confines of an existing case

or controversy does not burden courts or litigants. As an initial matter, Rule 24 already protects against "[i]mproper intervention," ensuring that mere "concerned bystanders" do not inject themselves where they do not belong. Pet. Br., 28, 47. Even the Town concedes that courtrooms are not "overrun with improper intervenors." Pet. Br., 50.

And once a party is permitted to intervene, courts have tools to ensure that they do not create a "drain on the judicial system" or "interfere with ... access to justice." Pet. Br., 47-48. "[D]istrict courts have the inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases." *Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016) (collecting cases). The Federal Rules likewise grant courts considerable discretion "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

Courts accordingly can control the "frequency and extent of discovery," either by barring certain requests or limiting "the number of depositions," "interrogatories," and requests for admission. Fed. R. Civ. P. 26(b)(1), (2)(A)-(C), (c)(1); *see* Fed. R. Civ. P. 16(c)(2)(F) (authority to "control[] and schedul[e] discovery"). They can "exercise reasonable control over the mode and order" that parties "present[] evidence." Fed. R. Evid. 611(a). And they routinely limit the number and length of briefs, as well as parties' ability to participate in oral argument. *See, e.g.*, S.D. Cal. L.R. 7.1(h); S.D.N.Y. L.R. 6.1(c); *Phifer ex rel. Phifer v. City of N.Y.*, No. 99-4422, 1999 WL 722013, at *3 (S.D.N.Y. Sept. 16, 1999). This broad discretion is at its peak in multiparty suits, where

the need "to regulate the actions of parties" is especially acute. *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 172 (1989); *see* Fed. R. Civ. P. 16(c)(2)(L) (encouraging courts to "adopt[] special procedures for managing potentially difficult or protracted actions that may involve ... multiple parties").

Contrary to the Town's assertion (Pet. Br., 10), courts have ample discretion to impose conditions on Rule 24(a)(2) intervenors. *See Stringfellow*, 480 U.S. at 383 (Brennan, J., concurring) ("[R]estrictions on participation may also be placed on an intervenor of right and on an original party."); *San Juan Cty. v. United States*, 503 F.3d 1163, 1189 (10th Cir. 2007) (en banc); Shapiro, *supra*, at 727, 756. "By its terms, Rule 24(a)(2) does not require that an intervenor be accorded the same treatment as a plaintiff with standing." U.S. Amicus Br., 23 n.5. The Advisory Committee Notes to Rule 24 provide that "[a]n intervention of right ... may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." Fed. R. Civ. P. 24, adv. comm. notes 1966. And indeed, courts regularly impose limits on the ability of intervenors as of right to file briefs, raise new arguments, and participate at trial. *See, e.g., Trbovich*, 404 U.S. at 537; *Forest Cty. Potawatomi Cmty. v. United States*, 317 F.R.D. 6, 15-16 (D.D.C. 2016). They also do not hesitate to restrict intervenors' participation in discovery, including by prohibiting them from "initiating unilateral, independent discovery" without court approval. *Planned Parenthood Minn., N.D., S.D. v. Daugaard*, 836 F. Supp. 2d 933, 943 (D.S.D. 2011); *see, e.g.*,

United States v. Duke Energy Corp., 171 F. Supp. 2d 560, 565 (M.D.N.C. 2001).

* * *

In sum, the text and purpose of Article III, settled precedent, and common sense all confirm that intervenors need not demonstrate independent standing to present the same claims and seek the same relief as another party that has already established a case or controversy.

II. THE TOWN'S CONTRARY RULE CONTRAVENES ESTABLISHED PRACTICE AND LEADS TO ABSURD RESULTS

The Town nevertheless insists that a court may not "decide any question at any point" unless it does so "at the request of a litigant with standing." Pet. Br., 18-19. The Town's own amicus—the United States—disavows that theory. *See* U.S. Amicus Br., 14-16. And with good reason: The Town's view is irreconcilable with longstanding judicial practice and makes no sense as applied to the different parties that properly and routinely ask courts to act on their behalf.

A. Article III "extend[s]" the "judicial power" to allow courts to take the steps necessary to resolve a case or controversy. U.S. Const. art. III, § 2. Thus, courts regularly exercise their judicial power on behalf of litigants who are participating in an existing case or controversy. Many of those litigants—including defendants, permissive intervenors, and amici—cannot demonstrate "an injury in fact," "fairly traceable to [another party's] challenged conduct," "that is likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at

1547. To be sure, these litigants must have a proper reason to appear before the court. But the Federal Rules—not Article III—guide those determinations. *See, e.g.*, Fed. R. Civ. P. 12, 24; Fed. R. App. P. 29. A separate requirement that these litigants also demonstrate standing would cause a sea change in established judicial practice.

1. Defendants use the judicial power to "impose burdens on [their] fellow litigants" all the time. Pet. Br., 13. They demand discovery and issue subpoenas. *See* Fed. R. Civ. P. 17, 26. They also ask courts to resolve discovery disputes, *see, e.g.*, *Godsey v. United States*, 133 F.R.D. 111, 113 (S.D. Miss. 1990), impose sanctions, *see, e.g.*, *Saunders v. Lucy Webb Haynes-Nat'l Training Sch. for Deaconesses & Missionaries*, 124 F.R.D. 3, 4 (D.D.C. 1989), hold hearings, *see, e.g.*, *Cruz-Martinez v. Hosp. Hermanos Melendez, Inc.*, 475 F. Supp. 2d 140, 142 (D.P.R. 2007), dismiss claims, *see, e.g.*, *Finley v. Dun & Bradstreet Corp.*, 471 F. Supp. 2d 485, 496 (D.N.J. 2007), and enter judgments, *see, e.g.*, *Callahan v. City of N.Y.*, 90 F. Supp. 3d 60, 76 (E.D.N.Y. 2015). Under the Town's theory, all of this conduct is unconstitutional unless the defendant establishes that it has standing. *See* Pet. Br., 18-19, 27-28.

That cannot be right. Courts do not ask whether *defendants* have Article III standing. That is because the standing inquiry does not "[l]imit[] the class of litigants who can appear before the federal courts." Pet. Br., 17. Rather, it focuses on the *plaintiff*—"the party who invokes the court's authority" by initiating a case or controversy. *Valley Forge*, 454 U.S. at 472; *see also, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

Once that authority is properly invoked, courts do not ask whether every action taken at the behest of every party involved in the case is independently justified by that party's standing. Indeed, it would be incoherent to require a defendant to "show that *he* personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the [*plaintiff*]." *Valley Forge*, 454 U.S. at 472 (emphasis added). [10] That impossible-to-satisfy standard would handcuff defendants from contesting the claims against them. *Cf. Bond v. United States*, 564 U.S. 211, 217 (2011) ("The requirement of Article III standing ... ha[s] no bearing upon [a defendant's] capacity to assert defenses in the District Court.").[11]

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[10] Discovery disputes are not "illegal conduct" that inflict an "injury" on parties. "[I]njur[ies] that [are] only a byproduct of the suit itself" are not "cognizable under Art. III." *Diamond*, 476 U.S. at 70-71; *see also Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000); *Steel Co.*, 523 U.S. at 107-08.

[11] Although a defendant must have standing to bring a counterclaim, *see, e.g.*, *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013), that is because he acts as a plaintiff by invoking the court's jurisdiction over a separate claim, *see, e.g.*, *Altvater v. Freeman*, 319 U.S. 359, 363-65 (1943). Likewise, while defendants need standing to appeal, that is because they are invoking the authority of a new court in order to "continue proceedings." *See, e.g.*, *Bond*, 564 U.S. at 217. Moreover, the criteria for appellate standing differ from the test for determining whether a plaintiff can sue in the first instance. "The most obvious difference ... is that the focus shifts to injury caused by the judgment rather than injury caused by the underlying facts." 15A C. Wright, et al., *Federal Practice & Procedure* § 3902 (2d ed. Jan. 2017 update).

2. The Town's view of judicial power also jeopardizes the constitutionality of intervention by defendants and by permissive intervenors under Rule 24.

Although Laroe is a plaintiff-intervenor, intervenors commonly participate as defendants, too. *See, e.g.*, *McConnell*, 540 U.S. at 233. Defendant-intervenors, like plaintiff-intervenors, are treated as "part[ies]" and have the same rights as original defendants. 7C C. Wright, et al., *Federal Practice & Procedure* § 1920 (3d ed. Jan. 2017 update). Under the Town's view, their participation is unconstitutional unless they first demonstrate standing. But defendant-intervenors do not have standing in any cognizable sense of that term. Requiring them to show that they have "suffered some actual or threatened injury as a result of the putatively illegal conduct of the [plaintiff]," *Valley Forge*, 454 U.S. at 472, makes no more sense than requiring any other defendant to do so. *See supra* 35-36.

Permissive intervention is also unconstitutional under the Town's view. Rule 24(b) allows a court to "permit anyone to intervene who ... has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). Permissive intervenors, like all intervenors, become "part[ies] to [a] suit" upon being granted intervention. *See Stringfellow*, 480 U.S. at 375; Wright, *supra* § 1920. They can partake in discovery, file motions and briefs, and participate at trial and argument. *See, e.g.*, *Venegas v. Mitchell*, 495 U.S. 82, 85-86 (1990); *Shaw v. Hunt*, 154 F.3d 161, 166 (4th Cir. 1998); *Am. Humanist Ass'n v. Maryland-Nat'l Capital*

Park & Planning Comm'n, 303 F.R.D. 266, 271 (D. Md. 2014). This Court has even awarded them costs. *See Shaw*, 154 F.3d at 163 (describing order in *Shaw v. Hunt*, Nos. 94-923, 94-924). According to the Town, all of these practices require standing. But this Court has recognized that Rule 24(b) "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." *Sec. & Exch. Comm'n v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459 (1940); *cf. Shaw*, 154 F.3d at 163 (describing this Court's award of costs to permissive intervenors who lacked standing).

Recognizing that Rule 24(b) does allow "an interested individual without standing to become a permissive intervenor," the Town suggests that a court can cure constitutional concerns by "limiting that individual's rights to ensure that she does not independently invoke the court's authority in any way." Pet. Br., 49. But courts have never understood that they *must* limit permissive intervenors in this manner. *See, e.g., Am. Humanist*, 303 F.R.D. at 271. The Town's approach, which precludes permissive intervenors from asking courts to "decide any legal issue, large or small," Pet. Br., 13, would relegate permissive intervenors to the role of mere amici, a status that inherently commands less attention from the court. That is contrary to this Court's precedent and settled practice.

3. Even amici are vulnerable under the Town's radical view of Article III. Amici regularly ask courts for permission to file briefs over the parties' objections or to participate in oral argument, requiring courts to issue opinions or orders. *See, e.g.*,

Voices for Choices v. Ill. Bell Tel. Co., 339 F.3d 542 (7th Cir. 2003); *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 134 (3d Cir. 2002). And "the time and other resources required for the ... study of, and response to, amicus briefs drive up the cost of litigation." *Voices for Choices*, 339 F.3d at 544. Parties are often compelled, as a practical matter, to address amici's arguments. *See infra* 47-48 (responding to arguments of the United States). And courts often resolve cases based on those arguments. *See, e.g., Mapp v. Ohio*, 367 U.S. 643, 646 n.3 (1961). Sometimes the presence of amici can even prompt judicial recusals, depriving the parties of adjudication by a judge familiar with the matter or of a hearing by a full court. *Cf. Perry v. Schwarzenegger*, 630 F.3d 909, 914 n.5 (9th Cir. 2011).

It does not matter that these particular exercises of judicial power may not formally "compel other litigants." Pet. Br., 5. Under the Town's view, Article III's restrictions sweep far more broadly than formal compulsion. If Article III truly precludes a court from "decid[ing] any question at any point" other than at the request of a litigant with standing (Pet. Br., 19), the longstanding practice of amicus participation is unconstitutional.

B. The Town's approach is also irreconcilable with other settled practices. *First*, as discussed above, this Court routinely declines to consider the standing of parties who raise the same claims and seek the same relief as another party that has standing. *See supra* 19-20. Under the Town's logic, this Court's decades-old practice has been unconstitutional from the start. If a party cannot participate in discovery or ask a court to decide "any question" without first

demonstrating standing, then many of the lower-court judgments that this Court has reviewed have been procured through serial violations of Article III. *See* Pet. Br., 18-19, 21. Parties without standing may well have participated in discovery, shaped the record, and made arguments in ways that were dispositive to the judgments below. Affirming those tainted judgments without considering whether the parties who obtained them had standing would violate the "special obligation" of every court "to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." *Steel Co.*, 523 U.S. at 95.

Second, the Town's position is incompatible with supplemental jurisdiction. That longstanding doctrine recognizes that certain state- and federal-law claims are so related that they "comprise[] but one constitutional case" and "there is power in federal courts to hear the whole." *Gibbs*, 383 U.S. at 725; *see also* 28 U.S.C. § 1367(a) (granting "supplemental jurisdiction over all other claims that are so related to claims in the action within ... original jurisdiction that they form part of the same case or controversy under Article III"). If every discovery dispute or other judicial action were its own case or controversy that required independent standing, there could be no such thing as supplemental jurisdiction over distinct claims that "form part of the same case or controversy under Article III." 28 U.S.C. § 1367(a).

III. THE TOWN'S RELIANCE ON THE LANGUAGE OF RULE 24 IS MISPLACED

Without any constitutional basis for its rule, the Town resorts to the alternative argument, also

advanced by the United States, that Rule 24(a)(2) itself incorporates the requirements of Article III standing. That theory is not properly presented here, and it fails in any event.

A. In Persuading This Court To Grant Certiorari To Consider The Requirements Of Article III, The Town Disclaimed Any Need To Construe Rule 24

Rule 24's requirements—as opposed to Article III's—are not at issue here. In its certiorari-stage briefing, the Town emphasized that the question of what Article III requires of intervenors is separate from the question of what Rule 24(a)(2) requires. *See, e.g.*, Pet. Reply, 6, 10-11. The Town claimed that only the former—whether, "in addition to satisfying the requirements of Rule 24(a), an intervenor must have Article III standing"—is presented here. Pet. 9; *see also id.* at 14, 19. Indeed, the Town insisted that "this case is a clean vehicle to decide the [threshold Article III] issue *because* [the lower courts] based their opinions on Article III standing exclusively." Pet. Reply, 10. "Rule 24 brings into play other considerations and factual matters that do nothing to illuminate the purely legal Article III question presented." *Id.*

Nevertheless, the Town now urges the Court to "put[] aside what the Constitution requires," and hold that the drafters of Rule 24(a)(2) intended for intervenors to show an interest "equivalent to Article III standing." Pet. Br., 33, 37. That is not the issue on which the Town "persuaded [the Court] to grant certiorari." *Visa v. Osborn*, 137 S. Ct. 289 (2016)

(mem.) (dismissing the writ as improvidently granted); *see also Czyzewski v. Jevic Holding Corp.*, -- S. Ct --, 2017 WL 1066259, at *15 (U.S. Mar. 22, 2017) (Thomas, J., dissenting). Nor is it properly presented here, given that the courts below did not expressly address it. *See* Pet. Reply, 10; *cf. City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1773 (2015) ("The Court does not ordinarily decide questions that were not passed on below."). The Court should not countenance the Town's bait and switch.

B. The Requirements Of Rule 24 Are Distinct From Those Of Article III

In any event, the text, history, and purpose of Rule 24 confirm that it does not require intervenors to demonstrate Article III standing.

1. The text of Rule 24 does not require standing

Rule 24(a)(2) asks a different question than Article III. "[T]he 'irreducible' constitutional minimum' of standing consists of three elements": "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547. Rule 24(a)(2), by contrast, grants intervention as of right to "anyone" who (1) "claims an interest relating to the property or transaction that is the subject of the action"; (2) "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest"; and (3) is not "adequately represent[ed]" by "existing parties." Fed. R. Civ. P. 24(a)(2). Many intervenors will satisfy both sets of criteria (as Laroe

does here, *see infra* 55). But these criteria nevertheless differ in important ways, and even when they yield the same outcome, they still pose different inquiries.

a. The first element of the standing analysis, "injury in fact," has multiple components. A plaintiff must show not only a particularized injury—i.e., "an invasion of a legally protected interest"—but also that the injury is "actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1548. This latter component of injury is absent from Rule 24(a)(2). Rule 24(a)(2) rejects the notion that the injury to a movant's interest must be "*certainly* impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). It does not even require an *actual invasion* of a legally protected interest at all. Instead, Rule 24(a)(2) allows intervention whenever a movant's "ability to protect its interest" "may as a practical matter [be] impair[ed] or impede[d]." Fed. R. Civ. P. 24(a)(2). *Impairment of an ability to protect* an interest asks a different question than *invasion* of the interest. And even an invasion of a legally protected interest is not cognizable under Article III if it merely "*may*" occur as a "*practical matter*." *See Clapper*, 133 S. Ct. at 1147 (an "objectively reasonable likelihood" of future injury is insufficient to establish standing).

It makes sense that Rule 24 would permit intervention under these circumstances. *See* Shapiro, *supra*, at 726. The plaintiff in the underlying litigation *has* suffered an actual injury; otherwise there would be no case or controversy in which to intervene. Allowing potentially affected parties to participate in that existing case to protect their

interests and to avoid multiplicitous litigation later is consistent with Rule 24's expansive purpose. *See infra* 49-52; *cf. Trbovich*, 404 U.S. at 536.

The Town focuses exclusively on the interest component of injury in fact. *See* Pet. Br., 33-35. But a plaintiff may have a legally protected interest yet lack standing if invasion of that interest is not "*certainly* impending." *Clapper*, 133 S. Ct. at 1147. In *Clapper*, for instance, the plaintiffs had a legally protected interest in the privacy of their communications. They nevertheless lacked standing because they failed to establish that their interest had actually been injured. *See id.* at 1148; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992) (a legally cognizable interest is insufficient to demonstrate an injury in fact). Rule 24(a)(2) does not incorporate the full scope of an Article III injury in fact.

Even as to the requisite "interest," while there is overlap between Rule 24 and Article III, *see* Brief in Opp., 11-13; *see also Donaldson v. United States*, 400 U.S. 517, 531 (1971), that overlap is not complete. Whatever the ultimate scope of Rule 24(a)(2)'s interest requirement, it was intended to focus "on the practical effect of litigation on a prospective intervenor rather than legal technicalities." *San Juan*, 503 F.3d at 1188; *see infra* 49-52. This Court accordingly has held that a private company can intervene as of right to protect its interest in preserving competition within the gas industry—even though that interest did "not even remotely resemble [a] direct and concrete stake in the litigation." *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 147 (1967) (Stewart,

J., dissenting); *see id.* at 136 (majority op.) (concluding that "Rule 24(a)(2) is broad enough to include" proposed intervenor). Similarly, for example, while the proponents of a ballot initiative lack Article III standing to defend the initiative when the state declines to do so, they nevertheless may have an interest sufficient to satisfy Rule 24(a)(2). *See Prete v. Bradbury*, 438 F.3d 949, 955-56 (9th Cir. 2006). Indeed, the Town itself has previously noted that "the majority of circuits" allow intervention to protect "interests" that are "too attenuated" to support standing. Pet., 20.

b. The Town does not even argue that Rule 24(a)(2) incorporates the remaining elements of standing—traceability and redressability. Nor could it.

While Article III standing asks whether the invasion of a plaintiff's interest is "*fairly traceable* to the *challenged conduct* of the *defendant*," *Spokeo*, 136 S. Ct. at 1547 (emphasis added), Rule 24(a)(2) asks whether the intervenor's interest is one "*relating to* the property or transaction that is the subject matter of the action." Fed. R. Civ. P. 24(a)(2) (emphasis added). The words "relating to" have a "broad," "deliberately expansive" meaning, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992), underscoring that any nexus required by Rule 24(a)(2) is looser than the traceability required to show standing, *see DaimlerChrysler*, 547 U.S. at 346. In addition, Rule 24(a)(2) ties any impairment of the intervenor's ability to protect its interest to the court's "*disposi[tion] of the action*"—not to the *conduct of the defendant*. Fed. R. Civ. P. 24(a)(2) (emphasis added). Thus, while Article III requires a

plaintiff to show that the defendant has actually injured him, Rule 24(a)(2) requires an intervenor to show only that the disposition of a suit may interfere with his ability to protect his interests in the future.[12]

Rule 24(a)(2) likewise does not incorporate the redressability component of standing. Standing requires a plaintiff to show that it is "likely, as opposed to merely speculative," that his "injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561. And a favorable judicial decision must "remedy [the plaintiff's] alleged injury" as a *legal* matter. *Id.* at 568. Thus, even "an authoritative construction" of a statute by this Court does not redress a plaintiff's injury unless the defendant who caused the plaintiff's injury is legally bound by it. *See id.* at 570-71 & n.5. Rule 24(a)(2), by contrast, eschews these technicalities and instead focuses on whether intervention might aid "the movant's ability to protect its interest" "as a practical matter." Fed. R. Civ. P. 24(a)(2).[13]

c. All of these differences make it particularly inappropriate for this Court to make an abstract pronouncement regarding the relationship between Rule 24 and Article III. The United States

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[12] For similar reasons, the requirement that an intervenor's interest "relat[e] to a judicial proceeding that is already in progress" does not "assure" an "actual injury" that is imminent *now*. U.S. Amicus Br., 19.

[13] Contrary to the United States' suggestion, nothing in Rule 24(a)(2) requires an intervenor to demonstrate that he "*will* [as opposed to may] receive a *tangible* [as opposed to practical] benefit if the court considers and accepts [his] legal arguments." U.S. Amicus Br., 20 (emphasis added).

nevertheless claims that Rule 24(a)(2) should be interpreted to require a standing analysis as a matter of constitutional avoidance. *See* U.S. Amicus Br., 9-10, 22. In other words, to avoid deciding *once* whether Article III imposes a threshold prerequisite on intervenors, the United States would require courts to conduct a constitutional analysis in *every* case involving intervention as of right. That is an exceedingly odd and paradoxical application of a principle that encourages courts to "forbear [from] resolving" constitutional questions. *Camreta*, 563 U.S. at 705.

It is also not clear what rule the United States is asking the Court to adopt. At some points, the United States suggests that courts should *replace* Rule 24(a)(2)'s criteria with Article III's standing analysis. *See* U.S. Amicus Br., 18-20. But that would improperly disregard the plain language of Rule 24(a)(2). *Cf. Watson v. United States*, 485 F.3d 1100, 1107 (10th Cir. 2007) (Gorsuch, J.) ("[I]t is our office to apply, not second guess, congressionally approved policy judgments ... delineated by the plain terms of [the Federal Rules.]"). Moreover, because "the factual record ... is insufficiently developed" here, Pet. App. 11a, this Court could not provide meaningful guidance on how courts should reconcile the differences between Rule 24(a)(2)'s language and Article III's case-or-controversy requirement. A bare declaration that Rule 24(a)(2) incorporates Article III standing would only generate confusion among the lower courts.

At other points, the United States suggests that Rule 24(a)(2) should be read to require the standing analysis *in addition* to its textual requirements. U.S.

Amicus Br., 17, 22. There is no basis, however, to add words to Rule 24(a)(2). *See Watson*, 485 F.3d at 1107. That is especially true when doing so would render aspects of the rule superfluous. *Cf. Washington Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879). A court would never need to inquire, for example, whether a movant's interest "*may* be impaired or impeded" because Article III's actual injury prong would ensure that it *has in fact* been injured. Requiring Article III standing on top of Rule 24(a)(2)'s elements also would burden courts by forcing them to evaluate standing before there is any constitutional need to do so. *See supra* 29-30.

2. The purpose and history of Rule 24 confirm that it does not require standing

The differences between Rule 24's language and the Article III standing inquiry reflect their different purposes. Article III ensures that the judicial power is not invoked unless there is an actual case or controversy that necessitates judicial intervention. *See supra* 13-14. Rule 24 ensures that, once there is a case or controversy, parties whose rights may be affected can participate. *See infra* 49-52. Of course, there is overlap between the sweep of these two provisions. But they nevertheless serve different objectives and ask different questions, making it particularly inappropriate to ignore their textual distinctions. Indeed, Rule 24's history confirms its purpose to allow people to intervene "who would be affected *in a practical sense* by the disposition of an action"—not in the exacting, legal sense contemplated by Article III's standing analysis. *San Juan*, 503 F.3d at 1189.

a. "The practice of allowing a stranger to intervene was first developed in the civil, the ecclesiastical, and the admiralty courts." James WM. Moore & Edward H. Levi, *Federal Intervention I. The Right to Intervene and Reorganization*, 45 YALE L.J. 565, 568 (1936). Originating in Roman law, intervention later made its way into France, Spain, England, and other European countries. *Id.*; *see* 2 C.L. Bates, *Federal Equity Procedure: A Treatise on the Procedure in Suits in Equity in the Circuit Courts of the United States Including Appeals and Appellate Procedure* 659 (1901). In the United States, the practice long predates the merger of law and equity. *See* Moore & Levi, *supra*, at 572.

The history of intervention "show[s] the development of a device by the courts to keep their processes from doing injury to third persons." *Id.* at 573. In its earliest phases, it was not "always necessary that the intervenor show a legal interest." *Id.* at 569. Sometimes "a humanitarian interest would suffice." *Id.* And French code allowed intervenors to "guard a present or future interest, or one certain, contingent, or collateral." Bates, *supra*, at 659. Even in the United States, intervention has long been available on broad terms. Equity Rule 37, a predecessor to Rule 24, provided: "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding." Wright, *supra*, § 1903 & n.2.

b. When the Federal Rules of Civil Procedure were first adopted in 1938, they sought to both "amplif[y] and restate[] the present federal practice

at law and in equity." *Id.* § 1903; *see also Cascade*, 386 U.S. at 134 ("[S]ome elasticity was injected."). In its original form, Rule 24 granted intervention as of right when (1) a statute "confers the unconditional right to intervene;" (2) "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action;" or (3) "when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof." Fed. R. Civ. P. 24 (1938). "[T]he limitation of Equity Rule 37, that intervention must be 'in subordination to, and in recognition of, the propriety of the main proceeding,' was not carried forward into Rule 24." Wright, *supra*, § 1903.

Courts and commentators viewed Rule 24 as too narrow. *First*, the requirement that an applicant be both bound by a decision and inadequately represented by existing parties created a null set. "If the representation of an absent party was inadequate, the absentee could not be bound by the judgment in the action[.]" *Id.* *Second*, and more importantly, subdivision (3)'s stipulation that "property" be in the "custody" of the court was "unduly restricted." Fed. R. Civ. P. 24, adv. comm. notes 1966. "If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene, and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of." *Id.* Courts accordingly construed Rule 24(a)(3)'s requirement "so loosely" that they could "find a fund in almost any in personam action." *Id.*

In 1966, with this Court's and Congress's approval, the Standing Committee amended Rule 24 to address both of these concerns. The amendments substantially revised subdivisions (2) and (3), combining them into a single provision that allows intervention as of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a)(2) (1966).

Together, these changes "refocus[ed]" the rule on practicalities rather than "legal technicalities," and "expand[ed] the circumstances in which intervention as of right would be appropriate." *San Juan*, 503 F.3d at 1188; *see* Fed. R. Civ. P. 24, adv. comm. notes 1966. They are thus consistent with the "expansion" throughout "[m]odern intervention practice" of what has "always been the underlying principle" of intervention: "the purpose of the courts to prevent their processes from being used to the prejudice of the rights of interested third parties." Moore & Levi, *supra*, at 573.

Construing Rule 24 to require an exacting Article III standing analysis conflicts with these purposes. Nothing in Rule 24's history suggests that its drafters meant the distinct language of Rule 24 to impose a standing requirement on intervenors. Indeed, the Standing Committee has amended Rule 24 four times since 1966 without any substantive changes to the provision governing intervenors as of right. *See* Fed. R. Civ. P. 24, adv. comm. notes 1987, 1991, 2006,

2007. If Rule 24's drafters had intended to incorporate a standing requirement, they had ample opportunity to say so by using the "well-developed, off-the-shelf body of law governing standing." Pet. Br., 37. Instead, they used the very different language of Rule 24—language expressly focused on practicalities rather than legal technicalities, and language that courts do not use to describe Article III's standing requirements. There is no basis to replace or supplement that language with the requirements of Article III.

3. Rule 19 offers no support for the Town's position

For all these reasons, the Town's reliance on the textual similarities between Rule 19 and Rule 24 is unavailing. *See* Pet. Br., 37-39. Rule 19 no more incorporates Article III's standing criteria than Rule 24 does.

The Town claims that it is "inconceivable that someone could have an interest sufficient ... under Rule 19(a)(1)(B), but nonetheless lack Article III standing." Pet. Br., 38. From this, the Town reasons that Rule 19 must require standing. *See id.* Rule 19(a), however, applies to both plaintiffs and defendants. Surely it does not impose a standing requirement on *joined* defendants when there is no such requirement for *original* defendants. *See supra* 35-36. Moreover, the Town fails to cite a single case in which a court has evaluated standing in the context of mandatory joinder, and Laroe has found none. Parties who oppose joinder, *see, e.g.*, *Ward v. Apple Inc.*, 791 F.3d 1041, 1048 (9th Cir. 2015), would have every incentive to raise the issue. The absence

of authority evaluating standing in this context suggests that no court or litigant has thought it is required.

IV. ARTICLE III POSES NO BARRIER TO LAROE'S ABILITY TO INTERVENE

These principles establish that Laroe need not establish Article III standing to intervene in order to pursue the same claim and seek the same relief as the plaintiff. The Second Circuit properly so held, and its judgment should be affirmed. But, in any event, Laroe can demonstrate standing if it is required to do so. Because the Second Circuit did not reach that question, this Court should not decide it in the first instance.

A. A court need not determine whether Laroe has Article III standing because it seeks to participate in this case only to support the same takings claim asserted by Sherman—a party whose standing is undisputed. Indeed, Laroe's intervenor-complaint explicitly states that the cause of action for "regulatory taking of plaintiffs' real property" "tracks the Cause of Action pleaded by Sherman." JA 157 & n.5. Both complaints allege that the Town's "repeated zoning changes and other roadblocks" constituted a taking of MareBrook "without due process or the payment of just compensation." *Compare* JA 157, 161, *with* JA 102, 104. And both complaints seek the same relief: "[a]n award of compensation for the taking" of MareBrook. *See* JA 122, 162; *see also* JA 22 (defining Sherman's "real property" to include "398 acres of land" known as "MareBrook").

Importantly, Laroe is not asking the court to award damages beyond what Sherman himself already seeks. "[T]here is one tract of land and one taking," and Laroe has never "suggest[ed] that the Town's exposure to Laroe is independent from its exposure to Sherman." Reply Br. at 12, *Laroe Estates*, No. 15-1086, ECF 60-1. Indeed, during oral argument below, counsel for Laroe explained that "there is only one pot of money," and Laroe is "not saying Sherman's and [Laroe's] damages are not the same damages." Oral Arg. Audio 27:08-27:18, *Laroe Estates*, No. 15-1086 (Jan. 27, 2016). Rather, there is "exactly one fund, and the Town doesn't have to do anything other than turn over the fund." *Id.* at 53:50-53:57. The Second Circuit correctly concluded that Laroe "asserts the same legal theories and seeks the same relief as [Sherman]," and that factual finding is not at issue here. Pet. App. 9a.

Under these circumstances, Article III does not require Laroe to demonstrate standing. *See supra* 13-27. After all, there is no dispute that Sherman has standing to pursue the takings claim. Nor can there be any dispute that Sherman continues to pursue that claim today. *See* Mot. of Sherman for Party Status at 7-8, No. 16-605 (Feb. 7, 2017) (describing Sherman's continued efforts to litigate takings claim). Accordingly, Sherman's standing establishes a live case or controversy regarding the Town's unconstitutional taking of MareBrook. Article III demands no more. *See supra* 13-17.

B. If Laroe were required to show standing, however, it could easily do so. As the Second Circuit recognized, Laroe "agreed to purchase property from Sherman, prepaid a substantial sum of money, and

signed a second agreement with Sherman that deemed the purchase price paid in full." Pet. App. 12a n.2. Under New York law, these actions made Laroe a contract vendee. *See Carnavalla v. Ferraro*, 281 A.D.2d 443, 443 (N.Y. App. Div. 2001). A contract vendee has equitable title to the property and enjoys the full rights of ownership. *See id.*; *Bean v. Walker*, 95 A.D.2d 70, 72 (N.Y. App. Div. 1983); *In re Site for Jefferson Houses*, 117 N.E.2d 896, 898 (N.Y. 1954); *New York Cent. & Hudson River R.R. Co. v. Cottle*, 187 A.D. 131, 144 (N.Y. App. Div. 1919), *aff'd* 129 N.E. 896 (N.Y. 1920); *Williams v. Haddock*, 39 N.E. 825, 826 (N.Y. 1895). And the owner of property has standing to challenge its unconstitutional taking. *See, e.g., Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1012-13 (1992).

C. Contrary to the Town's repeated suggestions (*e.g.*, Pet. Br., 5, 44), the Second Circuit did not pass upon Laroe's standing. It did not need to, in light of its holding that Article III does not require intervenors to demonstrate standing when there is "a genuine case or controversy between the existing parties." Pet. App. 2a. If this Court determines that Article III requires intervenors to demonstrate that they have independent standing, it should not decide Laroe's standing in the first instance but should leave the question to be resolved by the Second Circuit on remand. *See, e.g., Manuel v. City of Joliet*, -- S. Ct. --, 2017 WL 1050976, at *8 (U.S. Mar. 21, 2017); *see also* Pet., 26 ("The Court should grant the petition, ... vacate the decision below[,] and remand the case for further proceedings.").

* * * * *

The Constitution does not require courts to assess the independent standing of intervenors who pursue the same claims and seek the same relief as an existing plaintiff. Nor does Rule 24(a)(2). And the Town itself concedes that allowing intervention under these circumstances—as the overwhelming majority of circuits have done for decades—has not created an influx of improper intervenors. At bottom, the Town's argument for imposing an Article III overlay on all intervenors is a solution in search of a problem. And the principle underlying the Town's argument would create vast problems of its own, by jeopardizing established practices and imposing untenable standing requirements on defendants, defendant-intervenors, permissive intervenors, amici, and other participants in multiparty litigation.

CONCLUSION

For these reasons, the judgment below should be affirmed.

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No. 16-605

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TOWN OF CHESTER,
Petitioner,

v.

LAROE ESTATES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

In order to permit its intervention, Laroe urges the Court to adopt two sweeping principles that, taken together, would severely undermine the structural protections that Article III affords.

First, Laroe urges the Court to hold that a party needs Article III standing only to make an independent "claim" or seek separate "relief." By its lights, a party that lacks standing can invoke the judicial power in any other way it pleases: It can demand discovery, issue subpoenas, introduce evidence, obtain attorney's fees, and pursue an independent

litigation strategy potentially at odds with that of the existing parties. It may also require courts to resolve any legal issues that crop up along the way, all without demonstrating any cognizable interest in the case.

Second, Laroe asks the Court to announce that the Constitution places no limit on who may become a party in the federal courts. Congress could, for example, amend the Federal Rules to permit any person (no matter how attenuated her interest) to intervene in litigation between two adverse parties. Any suit could be joined by dozens, or hundreds, of these newly minted parties; only the grace of Congress keeps them from the courthouse now.

A standing limit that permits these results is hardly a limit at all. The Case-or-Controversy requirement constrains the judicial power to "the traditional role of Anglo-American courts," *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 492 (2009), and ensures that courts resolve questions only where "necess[ary] in the determination of" a "vital controversy," *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). At its core, that rule requires a party that exercises the privileges of a litigant to demonstrate at least a minimal legal interest in the outcome of the suit. Federal Rule of Civil Procedure 24(a)(2) ensures that intervenors as of right meet that threshold, and Article III demands no less.

At a bare minimum, Article III demands a standing inquiry where, as here, a party with standing opposes a motion to intervene on standing grounds in

district court. A plaintiff must be dismissed at the outset when there is a successful standing challenge, as a contrary rule would paradoxically give intervenors more rights than plaintiffs. Pet. Br. 25. That cannot be.

ARGUMENT

I. ARTICLE III MAKES STANDING A PREREQUISITE FOR INTERVENTION UNDER RULE 24(A).

A. The Case-or-Controversy Requirement Demands That Intervenors As Of Right Demonstrate Standing.

The parties agree—as they must—that Article III "limits the federal judicial power to situations where its exercise is 'a necessity in the determination of real, earnest and vital controversy.'" Resp. 14 (quoting *Valley Forge*, 454 U.S. at 471). The parties also agree—as they must—that enforcing this limit protects the "tripartite allocation of power" on which the Constitution is premised. *Id.* at 17-18 (quoting *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 353 (2006)). But Laroe nonetheless asserts that, as far as the Constitution is concerned, courts may compel a rightful litigant to press her suit alongside or against her neighbor, her congressman, and every other interested onlooker who wishes to "piggyback" on the litigant's case. Article III's Case-or-Controversy requirement is designed to foreclose precisely this type of hijacking of the judicial machinery by "concerned bystanders." *Valley Forge*, 454 U.S. at 473.

1. Laroe begins (at 14-15) from a faulty premise, asserting that a litigant must satisfy Article III's standing requirements only if she invokes the judicial power to decide an independent "claim" or issue a separate form of "relief." Laroe never denies that litigants invoke the judicial power in other ways, both implicitly to compel other parties to submit to their litigation demands, and explicitly to seek judicial resolution of any resulting disputes. *See* Pet. Br. 24-25. Laroe simply dismisses the application of standing doctrine in this respect, arguing that standing merely ensures that "judicial intervention" in a particular claim is "a necessity." Resp. 16. But that is not what this Court has said, and it is not what Article III requires: Judicial authority may be exercised only as a "necessity * * * *in the course of carrying out the judicial function of deciding cases.*" *DaimlerChrysler*, 547 U.S. at 340 (emphasis added).

It is a "necessity" for a court to exercise its authority to compel an injured plaintiff and a defendant from whom she seeks redress to accept the litigation burdens they place on one another and to resolve resulting disagreements. But it is *unnecessary*—and therefore *unconstitutional*—for a court to subject these parties to litigation burdens, and to decide the disputes that ensue, at the behest of an intervenor that lacks any "vital" stake in the controversy. *Cf. U.S. Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988) ("the subpoena power of a court * * * is subject to those limitations inherent in the body that issues them because of [Article III]").

Laroe fights this straightforward conclusion primarily by arguing (at 15) that Article III is concerned with preserving the separation of powers, and the "[a]ncillary case-management questions" an intervenor gratuitously introduces into a controversy are "not likely to implicate the core functions of the political branches." That is wrong.

First, Laroe's argument is mistaken on its own terms. Even ancillary disputes often implicate the powers of the other branches when the Government is a party. *See* Pet. Br. 27-28. For example, in *Cheney* v. *United States District Court*, 542 U.S. 367 (2004), the dispute involved discovery orders against the Vice President that allegedly burdened his ability to conduct his constitutional duties. The Court held that appropriate resolution of the discovery dispute required the district court to assess the scope of the Vice President's responsibilities and the effect of the document requests on his ability to fulfill them, *id.* at 390, precisely the sort of "measur[ing of] the authority of governments" that is "legitimate only in the last resort" in the course of deciding a "vital controversy," *Valley Forge*, 454 U.S. at 471. Yet, under Laroe's theory, an intervenor without standing in a suit against the Executive is free to make similar requests, and courts are free to resolve the resulting disputes, even though the intervenor's very presence in the suit is unnecessary.

Second, Laroe errs in asserting that the political branches are the only entities that standing doctrine is designed to protect. "[C]ourts must stay within their constitutionally prescribed sphere of action,

whether or not exceeding that sphere will harm one of the other two branches." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 102 n.4 (1998). The "finite bounds" established by Article III also "protect citizens from * * * the excessive use of judicial power." *U.S. Catholic Conference*, 487 U.S. at 77. Laroe does not explain how its theory of intervenor standing provides "due regard for the autonomy of those most likely to be affected by a judicial decision." *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986). Laroe does not even recognize this rationale for the standing doctrine *at all*.

Third, Laroe's theory permits lawsuits to be converted into legislative hearings. With no constitutional boundary on who may actively participate in a suit, the resolution of an individualized grievance could become the excuse for a proceeding in which ideologically or politically motivated persons on both sides of the question have as much of an opportunity to present evidence and advocate for their desired outcome as those with a concrete stake in the case. As Laroe acknowledges, standing doctrine exists to prevent such a "system of intermingled legislative and judicial powers." Resp. 13 (quoting *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995)).

Fourth, and finally, Laroe's theory flies in the face of *DaimlerChrysler*, which considered and rejected an analogous "theory of ancillary standing." 547 U.S. at 353. There, the Court held that the doctrine of supplemental jurisdiction articulated in *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715 (1966), does not permit "federal jurisdiction" to

"extend[] to all claims sufficiently related to a claim within Article III," if no plaintiff has standing to press those claims. 547 U.S. at 351. That application of supplemental jurisdiction would "erode" the Constitution's "tripartite allocation of power" because it would lead to courts "deciding issues they would not otherwise be authorized to decide." *Id.* at 353. Laroe's theory of ancillary standing would do the same: By Laroe's admission (at 15), it would allow courts to "resolve questions" posed exclusively by parties without standing. Indeed, Laroe *relies* (at 23) on the *Gibbs* doctrine of supplemental jurisdiction that *DaimlerChrysler* held inapplicable in the standing context. Laroe even doubles down on this error (at 26-27), asking the Court to view two intervention cases that, like *Gibbs*, have nothing to do with Article III standing—and involve intervenors that clearly had standing—as applicable precedent in this case.

2. As a fall-back, Laroe argues (at 28-29) that principles of constitutional avoidance favor waiting until an intervenor has made a formal request of the court before examining her standing. But Laroe cannot guarantee that there will be an opportunity for a standing analysis then, suggesting only that an intervenor is "*likely*" to press a new claim through an amended pleading and a court "*may*" then need to analyze her standing. *Id.* at 29. In any event, a standing assessment then, or even at an earlier point when the intervenor asks the court to decide a case-management question, will not suffice. There are many ways for intervenors to invoke "the judicial

Power" that do not give courts an opportunity to assess their standing, such as issuing a subpoena or making discovery demands. Pet. Br. 21-22, 24-25. It would be irony indeed if the doctrine of constitutional avoidance, designed to restrict gratuitous use of the judicial power, were employed to permit litigants to wield that authority unconstitutionally.

B. This Court's Decisions Do Not Permit A Person To Intervene Without Satisfying Article III Standing Requirements.

Finding no real theoretical support for its position, Laroe asserts that this Court's precedents foreclose a standing requirement for intervenors. Each argument fails.

1. Laroe begins by repeating (at 19) its erroneous certiorari-stage assertion that the cases in which this Court has held it has jurisdiction to *decide a question* because at least one petitioner has standing indicate that a district court may *permit intervention* by a person without standing. Not so. As Petitioner has explained (at 22-23), those holdings establish only two things: *First*, a court may not decide a question without establishing that its authority to do so has been invoked by a party that "has demonstrated standing." *Vill. of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977). And *second*, a court's jurisdiction to decide a particular issue at the behest of a party with standing is not destroyed when a party without standing simultaneously asks the court to decide the same issue.

Neither of these principles establishes that a person may intervene in the district court without demonstrating Article III standing; they show the opposite. That a court's authority cannot be invoked unless at least one party has standing underlines the need to scrutinize an intervenor's standing *before* authorizing her to invoke the judicial power. It is a virtual certainty that a Rule 24(a) intervenor will not be joined by a party with standing each time she invokes the court's authority. Rule 24(a) prevents a person from intervening unless she has an interest that cannot be "adequately represent[ed]" by an existing party. Fed. R. Civ. P. 24(a)(2). And even setting that rule aside, a person has no reason to intervene—as opposed to seeking participation merely as an *amicus*—if she is satisfied with how the existing parties are conducting the litigation.

As to the Court's recognition that jurisdiction is unaffected by the presence of parties without standing: Of course, their presence does not *deprive* a court of authority it would otherwise enjoy. The point is simply that an intervenor's presence cannot *enlarge* a court's authority by permitting it to be exercised in ways that a party with standing has not requested.

2. Laroe gets no help from cases cautioning that an appellate court may only be certain of its own jurisdiction by checking the jurisdiction "of the lower courts in [the] cause under review." Resp. 30 (quoting *Steel Co.*, 523 U.S. at 95). Appellate courts fulfill this task in the same way they decide their own jurisdiction: by ensuring that at least one party in

the lower court had standing to press the "cause under review." Laroe suggests that under Petitioner's theory, every appellate court must analyze the standing of every party below, because the resolution of the cause might have been altered by the presence of an improper party. But the fact that a party without standing may have shaped the *way* a lower court decided a question does not bear on whether that court had jurisdiction to decide the question in the first place. The participation of a party without standing might give rise to a challenge to the integrity of the merits outcome, but an appellant must raise the issue as it would any other contention that the outcome was tainted by a constitutional violation. *See Brecht* v. *Abrahamson*, 507 U.S. 619 (1993). If the constitutional error was obviously harmless, it may be overlooked. If it was not, the matter may be reconsidered without the participation of the impermissible party.

3. Similarly unavailing is Laroe's attempt (at 19) to draw support from this Court's decisions affirming a judgment and award of injunctive relief sought by multiple plaintiffs without ascertaining the standing of each one. In the cases Laroe cites, at least one party had standing to ask the Court to affirm the judgment and the injunction, meaning the Court had the authority to decide each question. The fact that doing so *benefitted* litigants who may have lacked standing does not make that exercise of authority unlawful. *See* Pet. Br. 22. If a party named in the judgment later sought to enforce it separately from the party whose standing the Court confirmed, it

would be necessary to check that party's standing *then*. But the Court's affirmance alone does not mean the judicial power will be exercised solely at the behest of a party without standing.

4. Not only is Laroe unable to find precedent in support of its rule, but that rule is irreconcilable with the precedent most directly on point: *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979). The *Gladstone* Court held that two plaintiffs who lacked standing could continue to litigate in the district court only by amending their complaint to allege a cognizable injury. *Id.* at 112 n.25. And the Court reached that conclusion even though the plaintiffs without standing pressed the same claims and sought the same injunctive relief as four other plaintiffs who *did* have standing. *Id.* at 94-95; *see* Pet. Br. 19-20.

Laroe tries (at 23) to wave this case away by observing that the plaintiffs that lacked standing also sought distinct monetary relief. But if Laroe's theory were right, the Court should have stated that the plaintiffs without standing could continue to litigate *either* by amending their complaint to allege cognizable injury *or* by deleting their request for monetary relief and seeking injunctive relief alone. The Court did nothing of the kind.

Nor is *Gladstone*'s precedential effect diminished by Laroe's citation to a handful of lower court cases in which a plaintiff without standing was nonetheless permitted to remain in a district court case. Resp. 21-22 & n.5. Of course, to the extent those cases are inconsistent with *Gladstone* and this

Court's other precedents, they are simply wrong. But many of the cases are distinguishable because there is no indication that the plaintiff without standing attempted to invoke the court's authority in any way distinct from a plaintiff with standing.

In this sense, intervenors are different even from "ride-along" plaintiffs that appear beside a plaintiff with standing on an initial complaint. A court may not need to check the standing of those additional plaintiffs unless and until there is any indication that they intend to act separately from the plaintiff with standing. Prospective intervenors, in contrast, *necessarily* seek the right to invoke the district court's authority in some way distinct from the existing parties, and so must establish their standing at the outset. Fed. R. Civ. P. 24(a); *see supra* p. 9.

C. Petitioner's Rule Is Fully Consistent With The Traditional Roles Of Defendants, Intervenors, And *Amici*.

1. Laroe's final defense of its constitutional rule rests on a false foundation. Laroe contends (at 35) that standing cannot be a prerequisite for imposing burdens on one's fellow litigants because defendants regularly "demand discovery and issue subpoenas," and "[c]ourts do not ask whether *defendants* have Article III standing." That is simply wrong. This Court has made clear that "[s]tanding to sue *or defend* is an aspect of the case-or-controversy requirement." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997) (emphasis added). The adversity the Constitution requires means that

standing exists only when there is a plaintiff with a cognizable injury *and* a defendant to whom that injury "is fairly traceable." *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547 (2016).

Laroe quotes the Court's opinion in *Bond* v. *United States*, 564 U.S. 211, 217 (2011), for the proposition that the "requirement of Article III standing . . . ha[s] no bearing upon [a defendant's] capacity to assert defenses in the District Court." Resp. 36 (alterations in original). *Bond* holds the opposite. As it explains, Article III is satisfied where a plaintiff has "standing to obtain the relief requested" *and* the defendant has "an ongoing interest in the dispute * * * that is sufficient to establish concrete adverseness." 564 U.S. at 217. It is only "[w]hen those conditions are met" that Article III "ha[s] no bearing" on a defendant's "capacity to assert defenses in the District Court." *Id.*

That does not mean, as Laroe suggests, that the standing requirement for defendants works the same as the one for plaintiffs, or that a party that is sued bears the burden of proving her own standing. "Article III requires the party who invokes the court's authority" to make the showings necessary to prove standing. *Valley Forge*, 454 U.S. at 472; *see Gladstone*, 441 U.S. at 99. How that works varies depending on the context. At the outset of a suit, it is the plaintiff's burden to demonstrate that each party has the requisite adversity. *Bond*, 564 U.S. at 217. When a defendant seeks to appeal an unfavorable decision, *it* must demonstrate that it has suffered "injury in fact" from the lower-court judgment.

Diamond, 476 U.S. at 65; *see also DaimlerChrysler*, 547 U.S. at 342 n.3 (defendant must prove standing to invoke the federal court's removal jurisdiction, but plaintiff must prove standing on appeal from resulting federal-court judgment). By the same token, when an individual seeks to intervene as a defendant in a district court, she must demonstrate that she faces "injury in fact" that is traceable to the relief the plaintiff seeks. *See, e.g.*, *Fund for Animals, Inc.* v. *Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003) (intervenor-defendant had standing because it would suffer a "concrete and imminent injury" from the relief plaintiff sought).

2. Laroe is also wrong in suggesting (at 37-38) that Petitioner's position has absurd consequences for intervention under Rule 24(b). While the Court need not reach the question, permissive intervenors may only share the existing parties' right to invoke the court's authority if they meet the same standing requirements. Contrary to Laroe's assertion, that is consistent with the possibility that a party without standing may intervene under Rule 24(b). As Petitioner and the Government have explained, courts have more leeway in limiting the rights of an intervenor under Rule 24(b) than they do under Rule 24(a). Pet. Br. 9-10; U.S. Br. 24-25. A party without standing may intervene under Rule 24(b) so long as the court limits her rights to prevent her from independently invoking the court's power. That is, she may offer her perspective on how the court should decide disputes presented by the parties, and she may otherwise participate in the litigation to the

extent those parties are willing to tolerate her presence and litigation demands. But she may not invoke the court's authority to compel submission to those demands, and she may not ask the court to decide any question that is not raised by a party with standing.

3. Finally, Laroe suggests (at 38) that even *amicus* participation would be unconstitutional under Petitioner's view. False. Deciding whether and on what terms a party may participate in a suit is a "necessity in the determination" of a "vital controversy." *Valley Forge*, 454 U.S. at 471. And voluntary or court appointed *amici* are free to offer guidance as to *how* a court should decide a question presented by adverse parties. Indeed, an individual without standing—whether her formal title is "concerned bystander," *amicus*, permissive intervenor, or intervenor as of right—may take a number of actions that influence and alter the outcome of a suit without offending Article III. What such an individual may *not* do is expand the judicial power beyond that necessary to decide a claim, by unilaterally invoking the court's authority to resolve a new question or to compel a new action.

II. RULE 24(A)(2) REQUIRES ARTICLE III STANDING.

The Federal Rules reinforce the conclusion that intervenors as of right must have Article III standing. Rule 24(a) *requires* a court to permit intervention when its conditions are met. It is hard to believe that Congress intended to force courts to open their

doors to litigants with no standing of their own. And indeed, for half a century, the Court has held that Rule 24(a) requires an entity to demonstrate "standing to intervene." *Cascade Nat. Gas Corp.* v. *El Paso Nat. Gas Co.*, 386 U.S. 129, 133 (1967). Since *Donaldson* v. *United States*, 400 U.S. 517 (1971), the Court has made clear that standing under Rule 24(a), just like under Article III, requires a "legally protectible" interest in the suit. *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 315 (1985). Those identical standards mean identical things; and the Rule's structure, its purpose, and common sense underscore that straightforward conclusion.

A. This Argument Is Properly Before The Court.

Laroe begins by trying to duck the question, claiming (at 41) that the meaning of Rule 24(a) is "not at issue here." That is incorrect. The question presented is "[w]hether intervenors participating in a lawsuit as of right under Federal Rule of Civil Procedure 24(a) must have Article III standing * * * ." Pet. i. The answer is yes, for two interrelated reasons: because Article III itself requires standing, and because Rule 24(a)(2) incorporates the requirements of Article III. As the Government explains, the Court may properly resolve the case on either ground.

Petitioner did not, as Laroe contends (at 41), "disclaim[]" reliance on Rule 24 at the certiorari stage. It merely suggested (accurately) that the Court did not need to wait for the lower courts to decide if Laroe has met all of the fact-specific requirements of

Rule 24(a) because the Second Circuit had already resolved the "purely legal" question presented. Cert. Reply Br. 10.

Nor is Laroe correct that this issue was not "passed on below." Resp. 42. The Second Circuit categorically held that standing is not a prerequisite for intervention as of right. Pet. App. 2a. And it expressly rejected the views of the Seventh and D.C. Circuits, both of which have treated standing as a component of intervention under Rule 24(a)(2). *Id.* at 7a-8a; *see* Pet. 11; U.S. Br. 22. There is no impediment to the Court's resolution of that split.

B. Laroe's Interpretation Of Rule 24(a)(2) Lacks Merit.

1. Laroe's response on the merits is no more convincing. Laroe does not dispute that Rule 24(a)(2) requires an intervenor to have a "legally protectible" interest in the suit. *Tiffany*, 469 U.S. at 315. Nor does it dispute that this standard requires an intervenor to identify an interest that is "direct," "concrete," and non-"speculative." Pet. Br. 34-35 & n.1. These requirements are identical to the criteria for Article III standing, and Laroe does not even attempt to identify a way in which they differ.

Quoting from a dissent, Laroe briefly suggests that *Cascade* permitted intervention by an entity that lacked a "direct and concrete stake in the litigation." Resp. 44 (quoting *Cascade*, 386 U.S. at 147 (Stewart, J., dissenting)). That is incorrect. In *Cascade*, the Court permitted two purchasers of natural gas to intervene to challenge a merger between two suppli-

ers, on the ground that the merger would saddle the purchasers with "new and allegedly onerous prices." 386 U.S. at 132-133. That pocketbook injury plainly conferred standing; indeed, the Court has found standing present on closely similar facts. *See Kansas* v. *UtiliCorp United, Inc.*, 497 U.S. 199, 206-207 (1990) (holding that "direct purchaser[s]" of natural gas have standing to bring antitrust claims against a supplier).

Laroe also claims (at 42-44) that Rule 24(a)(2) does not impose the Article III requirements of imminence, traceability, and redressability. As discussed below, that is wrong, but it would do nothing to help Laroe even if it were right. The District Court denied Laroe intervention because it lacks the requisite "interest in property" to have standing to contest Petitioner's alleged taking. Pet. App. 55a (quoting *U.S. Olympic Comm.* v. *Intelicense Corp., S.A.*, 737 F.2d 263, 268 (2d Cir. 1984)). Laroe thus fails at the threshold of having any "legally protectible" interest; the imminence or traceability of Laroe's legally non-cognizable injury is beside the point.

In any event, Laroe's attempts to distinguish the interest in Rule 24(a) from the interest required by Article III are unconvincing. More than a century ago, the Court held that a statutory predecessor of Rule 24(a) permitting intervention by anyone with an "interest in the matter in litigation" implicitly required the interest to be "of such a *direct* and *immediate* character that the intervener will either gain or lose *by the direct legal operation and effect of the judgment*." *Smith* v. *Gale*, 144 U.S. 509, 517-519

(1892) (emphases added). Likewise, in *Sutphen Estates* v. *United States*, 342 U.S. 19 (1951), the Court said that an intervenor must identify some "imminent" "liability" that it would incur if relief is granted; a "claim of injury" that is merely "speculative" and "contingent" does not suffice. *Id.* at 22-23. And, in *Donaldson*, as Justice O'Connor explained in her *Diamond* concurrence, the Court required at least a "palpable threat of * * * liability," not merely a "speculative" or "contingent" risk of harm. *Diamond*, 476 U.S. at 76 (O'Connor, J., concurring in part and concurring in the judgment).

The "interest" prong of Rule 24(a)(2) thus incorporates all of the components of Article III standing. An intervenor who shows a "direct," "immediate," and non-"speculative" threat of harm necessarily satisfies Article III's requirement that her injury be "actual or imminent" rather than "speculative." *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). Because Rule 24(a)'s interest prong also requires that this harm be related to the matter under suit, the intervenor's alleged injury will necessarily be "fairly traceable to the challenged action." *Id.* And a "legally protectible" interest that meets these requirements, *Tiffany*, 469 U.S. at 315, is "redressable by a favorable ruling," *Clapper*, 133 S. Ct. at 1147.

The second prong of Rule 24(a)(2), which requires that an intervenor be "so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest," further confirms that an individual that lacks Article

III standing cannot intervene as of right. In order to demonstrate that an ongoing suit may "impair" or "impede" her interest, an intervenor must show the sort of risk of imminent harm from a judgment that this Court has repeatedly found sufficient to satisfy Article III. *See, e.g.*, *Susan B. Anthony List* v. *Driehaus*, 134 S. Ct. 2334, 2343 (2014) (finding Article III standing to bring a pre-enforcement challenge of a law that threatened imminent harm).

2. A comparison between Rules 24(a)(2) and 19(a)(1)(B) fortifies this conclusion. By design, these two Rules impose nearly identical criteria for intervention as of right and mandatory joinder. Pet. Br. 37-39. Laroe does not attempt to claim otherwise. Yet it embraces the view that "proponents of a ballot initiative" and other "attenuated" interests in a case are entitled to intervene as of right. Resp. 45. Entities with such frail interests, however, cannot possibly qualify as necessary parties under Rule 19.

Laroe objects (at 52) that it cannot find any cases that have expressly discussed Article III standing in the context of Rule 19. But as Petitioner has explained (at 38), in every Rule 19 case it can find, mandatorily joined parties had an interest easily establishing Article III standing. Despite conducting its own search, Laroe has failed to locate a single counterexample. Because Rules 24(a)(2) and 19(a)(1)(B) must be interpreted in tandem, Rule 24 requires an interest of similar magnitude.

3. Laroe also looks to the history and purpose of Rule 24 for support, but there too it comes up empty-handed. Laroe agrees (at 50-51) that Rule 24(a)(2)

was amended in 1966 to achieve two narrow goals: to remove the requirement that an intervenor be "bound by a decision," and to free courts from the obligation to determine whether property was "in the 'custody' of the court." Nothing about these amendments altered "the *kind* of interest necessary" for intervention as of right. Pet. Br. 40 (citing authorities). Thus, like its predecessor, the revised Rule continues to require an interest at least sufficient to confer Article III standing. *Id.* at 39-40.

Laroe nonetheless claims (at 51) that the 1966 amendments " 'refocus[ed]' the rule on practicalities rather than 'legal technicalities.' " That is irrelevant twice over. As Laroe's own recounting of the history confirms, the drafters refocused the rule on "practicalities" in specific ways, by eliminating two requirements the drafters deemed overly formalistic. It is not the Court's role to search for additional ways of enhancing the Rule's "practicalit[y]" that the drafters themselves did not select. *See Kucana* v. *Holder*, 558 U.S. 233, 252 (2010) ("no law pursues its purpose at all costs").

Furthermore, contrary to Laroe's apparent view, Article III is not concerned with "legal technicalities." Resp. 44. The Court has made clear that standing is not "a mechanical exercise," *Allen* v. *Wright*, 468 U.S. 737, 751 (1984), *abrogated on other grounds by Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), but "undeniably" permits litigants to assert interests as practical as "the desire to * * * observe an animal species * * * for purely esthetic purposes," *Lujan* v. *Defs. of*

Wildlife, 504 U.S. 555, 562 (1992), or to engage in "activities or pastimes," *Sierra Club* v. *Morton*, 405 U.S. 727, 735 (1972). It just requires *some* interest that is "legally protected." *Lujan*, 504 U.S. at 560.

4. Finally, Laroe appears to concede each of the implausible consequences its reading would entail. It acknowledges that its rule would enable plaintiffs dismissed for lack of standing to reenter the suit promptly as intervenors as of right. Pet. Br. 41. It just thinks this is fine because of its misguided view that any party can participate in a suit and invoke a court's authority without standing. Resp. 28 n.7; *see supra* pp. 4-5, 12-13.

Likewise, Laroe does not dispute that its interpretation would require courts to conduct two almost wholly duplicative "interest" analyses—once under Rule 24, and again when an intervenor inevitably invokes a court's authority. Pet. Br. 41; *see* U.S. Br. 22. Laroe asserts (at 28 n.8) that intervenors might make no requests of the court beyond those of the named parties. But, as noted, *supra* p. 9, both the Rule's text (which requires an intervenor's interest to be inadequately represented by existing parties), and logic (which dictates that intervention is wasteful and unnecessary in these circumstances) make it a virtual certainty that intervenors will act differently than the original parties. And contrary to Laroe's claim, the Federal Rules nowhere require *amici* to show their interests are not adequately represented or anything other than wholly duplicative of the parties'.

Finally, Laroe has no response to Petitioner's observation that its rule would work a "bait and switch" in light of *Diamond* and *Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370 (1987). Pet. Br. 42-43. Laroe just throws up its hands and says that the possibility of months of wasted effort or an unappealable order is "a risk that intervenors assume." Resp. 29 n.9. That response does not demonstrate how such a system makes sense, or accords with the assumptions underlying this Court's precedents.

III. LAROE'S POLICY ARGUMENTS ARE WITHOUT MERIT.

Laroe offers a variety of policy reasons of its own to support its rule. None has merit.[1]

Laroe argues (at 29-30) that requiring intervenors as of right to demonstrate standing would "waste judicial resources." That gets things backwards. Consolidating the standing inquiry with the nearly indistinguishable "interest" analysis under Rule 24(a)(2) would be *more* efficient, not less. And ensur-

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[1] Laroe also argues (at 53) that the entire question presented is irrelevant as a practical matter because Laroe can demonstrate Article III standing. Laroe further offers (at 2-6) a statement of "facts" crafted to create the illusion that it can meet Article III's requirements. The District Court—taking a different view of these facts—correctly concluded otherwise. And because the Second Circuit assumed Laroe lacked standing when it held that deficiency was irrelevant, even Laroe concedes (at 53) that the question is not properly before this Court.

ing that only entities with a cognizable stake in the case can exercise the privileges of litigants is not a "waste"; it is a constitutional necessity that *prevents* waste by ensuring that scarce judicial resources are spent deciding live disputes between adverse parties. Pet. Br. 45-47.

Laroe further contends that intervenors "subject[] the existing parties 'to relatively little additional burden.' " Resp. 31 (quoting *Trbovich* v. *United Mine Workers of Am.*, 404 U.S. 528, 536 (1972)). Evidence and common sense suggest the opposite: Intervenors require "[c]ourts [to] listen to additional witnesses, arguments, and demand requests which extend litigation over a much longer time frame." Nat'l Ass'n Ctys. Amicus Br. 5-6.

Apparently recognizing the inevitable burdens its rule would impose, Laroe offers (at 31-33) a series of ways courts might mitigate them. But Laroe overstates the efficacy of each one. It says that courts have "ample discretion to impose conditions on Rule 24(a)(2) intervenors," *id.* at 33, but this power is limited to "reasonable" restrictions "of a housekeeping nature," 7C Charles Alan Wright et al., *Federal Practice & Procedure* § 1922 (3d ed. Apr. 2016 update). Similarly, courts generally lack the power to deny discovery outright, and any limits on discovery must be reasonable. *See, e.g.*, *Danny B. ex rel. Elliott* v. *Raimondo*, 784 F.3d 825, 837 (1st Cir. 2015). Anyway, Laroe would presumably object to the restrictive limitations necessary to make intervention without standing constitutional. *See supra* Part I.C.2.

While this sort of dispute might look technical after Laroe's rhetoric, there are two telling places where Laroe reveals what is really at stake in this case. Laroe admits (at 30) that it seeks a rule dispensing with the standing requirement for intervenors to enable "related claims to be decided together." Indeed, it argues (at 2) that any other rule would "handcuff the judicial power to resolve live cases." But "related claims" brought by intervenors that lack standing to bring them are precisely the sort that Article III bars a court from considering. And these constraints are not "handcuff[s]"; they are the time-honored limits the Framers placed on federal courts. Only Petitioner's rule ensures that these constitutional boundaries are enforced.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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No. 16-605

In the Supreme Court of the United States

TOWN OF CHESTER, NEW YORK, PETITIONER

v.

LAROE ESTATES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a person seeking to intervene as of right pursuant to Federal Rule of Civil Procedure 24(a)(2) must satisfy Article III standing requirements.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether Article III standing is required to intervene as of right pursuant to Federal Rule of Civil Procedure 24(a)(2). The United States is frequently a party to litigation in which private entities seek to intervene. The United States also regularly intervenes in private law suits, under a variety of federal statutes and rules, to protect any government interest implicated by such litigation. The United States therefore has a substantial interest in the standards applied by district courts in ruling on motions to intervene.

STATEMENT

1. This case arises from the abandoned MareBrook real-estate development project in petitioner Town of Chester, New York. See Pet. App. 2a, 22a-23a. In 2000, land-developer Steven Sherman (who is now deceased,

id. at 2a) applied to petitioner for subdivision approval while he was buying the nearly 400-acre parcel of land that he planned to develop as a residential subdivision. *Id.* at 22a; see *Sherman* v. *Town of Chester*, 752 F.3d 554, 557 (2d Cir. 2014). Sherman's development plans were stymied, however, when petitioner adopted new zoning regulations every year from 2003 through 2007 and took various other actions that prevented approval of the MareBrook project. *Sherman*, 752 F.3d at 557.

In 2003, while Sherman was trying to obtain the zoning approval necessary for development of his project, he entered into a purchase agreement with respondent Laroe Estates, Inc., a real-estate-development company. Pet. App. 2a-3a. Under that agreement, respondent would purchase three parcels in the proposed MareBrook subdivision in exchange for $60,000 for each lot approved for development within those three parcels once Sherman obtained subdivision approval from petitioner. *Id.* at 3a. The agreement also required respondent to make a total of $6 million in interim payments while Sherman sought subdivision approval. *Ibid.* Those payments were secured by a mortgage encumbering all of the property proposed for development. *Ibid.* In the first year of the agreement, respondent made a total of $2.5 million in payments. *Ibid.*

In 2013, TD Bank, which held the senior mortgage on the property proposed for development, initiated foreclosure proceedings. Pet. App. 3a. Hoping to salvage the development project despite the foreclosure, respondent and Sherman entered into a new arrangement. *Id.* at 3a-4a. That agreement provided that the $2.5 million respondent had already paid to Sherman, plus any amount respondent would pay to

settle Sherman's obligations to TD Bank, would constitute the purchase price of the entire property. *Id.* at 4a. Respondent was unable to settle TD Bank's claim, and TD Bank took possession of the property in 2014. *Ibid.* Although the 2013 agreement authorized respondent to terminate that agreement if it was unable to settle TD Bank's claim, respondent chose not to do so. *Ibid.*

2. a. In 2008, Sherman filed suit against petitioner in federal district court, asserting (in relevant part) a federal regulatory takings claim based on petitioner's repeated amendments to its zoning laws as well as other actions that had prevented Sherman from developing his property. Pet. App. 22a-23a.[1] Sherman voluntarily dismissed that suit in 2012 and filed this action in state court several days later. *Id.* at 23a-24a. Petitioner then removed the case to federal district court. *Id.* at 24a. In March 2013, the district court dismissed Sherman's regulatory takings claim against petitioner, holding that the claim was unripe because Sherman had not received a final decision concerning development of his property and because seeking such a decision would not be futile. *Id.* at 23a; see *Sherman*, 752 F.3d at 557. The Second Circuit reversed and remanded, holding that Sherman's takings claim was ripe and timely filed. *Sherman*, 752 F.3d at 561-564, 568-569; Pet. App. 2a-3a, 24a-25a.

b. While the case was on remand, respondent filed a motion to intervene as of right pursuant to Federal Rule of Civil Procedure 24(a)(2). Rule 24(a)(2) pro-

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[1] Sherman's estate was substituted as the plaintiff after Sherman's death during the pendency of the litigation. Pet. App. 21a n.2. Consistent with the opinions below, this brief will refer to the individual plaintiff.

vides that, "[o]n timely motion, [a district] court must permit anyone to intervene who * * * claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). Respondent argued that, as a mortgage holder ("contract vendee"), it had a sufficient equitable interest in the relevant property to assert a takings claim against petitioner. Pet. App. 54a. Respondent's complaint in intervention purported to "track[] the Cause of Action pleaded by Sherman," J.A. 157 n.5, seeking just compensation for "a regulatory taking of [its] property * * * under * * * *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)," J.A. 160. Respondent sought an award of compensation for "the taking of [its] interest in the subject real property." J.A. 162.

The district court denied respondent's motion to intervene as of right. Pet. App. 54a-57a. The court concluded that permitting respondent to intervene would be "futile" because respondent had failed to state a legally sufficient claim against petitioner. *Id.* at 57a. The court found respondent's claim to be legally insufficient based on circuit precedent holding that a contract vendee like respondent lacks standing to assert a takings claim. *Id.* at 55a-57a.

c. The court of appeals vacated and remanded. Pet. App. 1a-19a. The court of appeals rejected what it understood to be the district court's holding that "a party seeking to intervene as of right must independently have standing." *Id.* at 6a. The court of appeals stated that "'there [is] no need to impose the

standing requirement upon [a] proposed intervenor' where '[t]he existence of a case or controversy [has] been established' in the underlying litigation." *Id.* at 7a (quoting *United States Postal Serv.* v. *Brennan*, 579 F.2d 188, 190 (2d Cir. 1978)) (brackets in original). Acknowledging that this Court has not yet decided whether an intervenor must have standing in its own right, the court of appeals viewed this Court as having "*sub silentio* permitted parties to intervene in cases that satisfy the 'case or controversy' requirement without determining whether those parties independently have standing." *Id.* at 8a (citing *McConnell* v. *FEC*, 540 U.S. 93, 233 (2003), overruled on other grounds by *Citizens United* v. *FEC*, 558 U.S. 310 (2010)). The court of appeals thus concluded that Article III does not bar respondent's proposed intervention.

The court of appeals further held that a plaintiff-intervenor need not have an independent, stand-alone claim in order to intervene as of right under Rule 24(a)(2). Pet. App. 9a-10a. The court relied on this Court's decision in *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972), in which an individual who lacked an independent cause of action was permitted to intervene at least to the extent he asserted the same legal theories and sought the same relief as the original plaintiff. Pet. App. 9a. The court of appeals held that whether respondent had an independent cause of action was not relevant to whether it could intervene pursuant to Rule 24(a)(2) so long as respondent "seeks relief that does not differ substantially from that sought by Sherman." *Id.* at 10a. The court of appeals remanded the case to the district court for

an evaluation of whether respondent satisfied the requirements of Rule 24(a)(2). *Id.* at 10a-11a, 13a-18a.

SUMMARY OF ARGUMENT

Federal Rule of Civil Procedure 24(a)(2) is best construed to incorporate the requirements of Article III standing, so that a litigant must at a minimum establish his Article III standing in order to qualify for intervention as of right under the terms of the Rule. That approach reflects the most natural reading of the Rule, promotes judicial efficiency, and avoids the need to decide whether the Constitution itself requires a litigant to establish the elements of Article III standing in order to intervene as of right.

A. Article III limits the exercise of a federal court's jurisdiction to cases and controversies in which a litigant has been injured in a concrete and particularized manner by a defendant's allegedly unlawful action. A plaintiff must establish standing with respect to each of its claims and each form of relief sought. The scope of a federal court's jurisdiction is therefore prescribed by the extent to which a litigant has established standing. And because the requisite adversity must exist at every stage of the litigation, a federal appellate court cannot exercise jurisdiction unless a party with Article III standing has pursued an appeal.

This Court has made clear, however, that as long as one plaintiff has established standing to bring a particular suit, a federal court need not inquire into the standing of co-plaintiffs who assert the same legal claims and seek the same relief. Similarly, on appeal, although a federal appellate court can act only at the behest of an appellant with a concrete ongoing interest in the litigation, the court need not decide whether other appellants also have standing. As long

as a litigant who has not demonstrated standing does not seek to expand the scope of the litigation beyond that justified by a party with established standing, Article III's limits on federal jurisdiction are satisfied.

The same basic principles apply to intervenors. Some actions that an intervenor might seek to take would require a showing of standing, but others would not. In principle, a court could choose to inquire into an intervenor's independent standing at the point of intervention or could choose to delay that inquiry until a point (if one arises) when an intervenor seeks to take some particular step for which standing is constitutionally required. Although the drafters of the Federal Rules could permissibly have adopted either approach, Rule 24(a)(2) as written is best construed to require a threshold showing of standing for intervention as of right.

B. Federal Rule of Civil Procedure 24(a)(2) requires a district court to grant a timely motion to intervene when a movant can establish (a) "an interest relating to the property or transaction that is the subject of the action," (b) a risk that "disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest," and (c) inadequate representation of the movant's interest by the existing parties. Fed. R. Civ. P. 24(a)(2). Those requirements map comfortably onto the constitutional requirements of standing and should be interpreted to require a showing of standing.

By requiring a movant to demonstrate that he has an interest in the property or transaction that is the subject of the litigation and that his interest is at risk of impairment absent intervention, Rule 24(a)(2) requires a movant to establish that he has a legally pro-

tected interest in the subject of the action and that, as a result of the action, he is at risk of suffering an actual and imminent injury that is both concrete and particularized. The Rule's requirements that a putative intervenor demonstrate that his interest may be impaired by disposition of the action and that his interest is not adequately represented by existing parties are also naturally construed to require a showing of causation and redressability.

Construing Rule 24(a)(2) to call for a threshold showing that satisfies the requirements for Article III standing is consistent with the most natural reading of the Rule and with principles of efficient judicial administration. That interpretation also obviates the need to decide whether Article III would require a showing of standing as a prerequisite to intervention. Such a construction is particularly appropriate in light of the Rule's requirement that an intervenor establish that his interests are not adequately protected by existing parties. A litigant who makes such a showing is particularly likely to alter the contours of the existing litigation in a way that would ultimately require an inquiry into the intervenor's standing. And, like any party to a suit, an intervenor may take steps that will slow the progress of the suit, increase the costs associated with the suit, or extend the life of the suit beyond what the original parties intended. Requiring a showing of standing before requiring parties and the judicial system to accept such burdens is consistent with Article III's respect for the autonomy of the persons most likely to be affected by a judicial order and largely obviates the need for later inquiries into whether Article III authorizes the intervenor and the court to take particular steps.

ARGUMENT

FEDERAL RULE OF CIVIL PROCEDURE 24(a)(2) REQUIRES A LITIGANT SEEKING TO INTERVENE AS OF RIGHT TO ESTABLISH ARTICLE III STANDING

Courts, including this Court, have often framed the question presented here as "whether a party seeking to intervene before a district court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art[icle] III." *Diamond* v. *Charles*, 476 U.S. 54, 69 (1986). That formulation reflects an implicit premise that a litigant can satisfy the requirements of Federal Rule of Civil Procedure 24(a)(2) without establishing that it has Article III standing. That premise is mistaken. Rule 24(a)(2) is best construed to *incorporate* the requirements of Article III standing, so that a litigant must establish his standing in order to qualify for intervention as of right under the terms of the Rule.

That approach reflects the most natural reading of Rule 24(a)(2)'s text, which requires the movant to show, *inter alia*, that it has "an interest relating to the property or transaction that is the subject of the action." Fed. R. Civ. P. 24(a)(2). The term "interest" in Rule 24(a)(2) is best construed to mean a stake in the litigation that is at least sufficiently concrete and specific to give rise to Article III standing. That approach also promotes judicial efficiency by largely obviating the need for further Article III inquiries if and when the intervenor subsequently attempts to expand the dimensions of the suit beyond its contours as framed by the original parties. And construing Rule 24(a)(2) to incorporate the requirements for standing under Article III eliminates the need to determine whether the Constitution itself makes satis-

faction of those requirements a prerequisite to intervention in a federal-court suit.

A. Article III Standing Is Required For Some But Not All Forms Of Participation In A Federal-Court Action

1. Article III of the United States Constitution limits the reach of "[t]he judicial Power" to "Cases" and "Controversies." U.S. Const. Art. III, § 2, Cl. 1. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 341 (2006) (citations omitted). To invoke the jurisdiction of a federal court, a plaintiff must allege (and ultimately prove) that it has suffered an actual or imminent individualized injury to a "legally protected interest," that the injury is "fairly traceable" to the defendant's challenged conduct, and that the injury can be redressed by a favorable decision. *Arizona Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 134 (2011) (brackets, ellipsis, and citation omitted).

"[T]he law of Art[icle] III standing is built on a single basic idea—the idea of separation of powers." *Allen* v. *Wright*, 468 U.S. 737, 752 (1984), abrogated on other grounds by *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014); see *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). "The several doctrines that have grown up to elaborate th[e]" case-or-controversy "requirement are 'founded in concern about the proper—and properly limited—role of the courts in a democratic society.'" *Allen*, 468 U.S. at 750 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975)). Article III standing principles reflect the traditional understanding that the exercise

of judicial power "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (quoting *Chicago & Grand Trunk Ry. Co.* v. *Wellman*, 143 U.S. 339, 345 (1892)).

The requirement that a plaintiff allege a concrete injury ensures that federal courts will exercise the judicial power only at the behest of persons who will be concretely affected by the court's decision. Standing requirements thus reflect "a due regard for the autonomy of those most likely to be affected by a judicial decision," *Diamond*, 476 U.S. at 62, by "restrict[ing]" the "exercise of judicial power" "to litigants who can show [an] 'injury in fact' resulting from the action which they seek to have the court adjudicate," *Valley Forge*, 454 U.S. at 473. "The requirement that a party seeking review must allege facts showing that he is himself adversely affected * * * serve[s] as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome." *Sierra Club* v. *Morton*, 405 U.S. 727, 740 (1972).

2. "[S]tanding is not dispensed in gross." *Lewis* v. *Casey*, 518 U.S. 343, 358 n.6 (1996). Rather, a plaintiff must separately demonstrate standing with respect to each claim and each form of relief sought. *DaimlerChrysler Corp.*, 547 U.S. at 352; *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs., Inc. (TOC)*, 528 U.S. 167, 185 (2000). Article III standing requirements would not effectively confine federal courts to their constitutionally assigned role if a plaintiff's showing of injury from one alleged violation allowed it to chal-

lenge other actions of the defendant that caused it no concrete harm. See, *e.g.*, *Lewis*, 518 U.S. at 357. And, if the plaintiff ultimately prevails, "[t]he remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Ibid.* Those requirements ensure that federal courts decide issues of law, and exercise coercive power, only to the extent necessary to determine and enforce the rights of persons having a concrete stake in the outcome.

Even when the requisite adversity has been shown to exist in the district court, a federal appellate court cannot exercise jurisdiction unless a party with Article III standing has pursued an appeal. In *Diamond*, an individual was permitted to intervene to support the State of Illinois in defending the constitutionality of one of the State's laws. 476 U.S. at 56-58. When the State declined to appeal to this Court from an adverse Seventh Circuit ruling, the defendant-intervenor filed an appeal. *Id.* at 61. This Court dismissed the appeal, holding that the intervenor did not have standing to pursue the appeal on his own because he lacked a direct stake in the dispute. *Id.* at 61-71.

The Court in *Diamond* observed that, if the State (the original defendant) had "sought review, this Court's Rule [governing participation on appeal] ma[de] clear that [the individual], as an intervening defendant below, also would be entitled to seek review, enabling him to file a brief on the merits, and to seek leave to argue orally." 476 U.S. at 64. The Court explained, however, that "this ability to ride 'piggyback' on the State's undoubted standing exists only if the State is in fact an appellant before the Court; in the absence of the State in that capacity, there is no

case for [the intervenor] to join." *Ibid.* In finding that the intervenor lacked standing to appeal, the Court observed, *inter alia*, that the intervenor's "desire that the [challenged state law] as written be obeyed" was insufficient to establish standing because "Article III requires more than a desire to vindicate value interests." *Id.* at 66. Because the intervenor could not establish a judicially cognizable injury resulting from the Seventh Circuit's decision, *id.* at 68-71, the Court dismissed the appeal for want of jurisdiction, *id.* at 71.

The Court in *Diamond* stated that it "need not decide today whether a party seeking to intervene before a district court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art[icle] III." 476 U.S. at 68-69. The Court's decision makes clear, however, that an intervenor who seeks to invoke the jurisdiction of an appellate court when no other party has done so must demonstrate Article III standing. At that point, "due regard for the autonomy of those most likely to be affected by a judicial decision" requires that "the decision to seek review must be placed 'in the hands of those who have a direct stake in the outcome.'" *Id.* at 62 (quoting *Sierra Club*, 405 U.S. at 740); see *Wittman* v. *Personhuballah*, 136 S. Ct. 1732, 1737 (2016); *Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2661 (2013); *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64, 65 (1997) (explaining that Article III standing requirements "must be met by persons seeking appellate review" as well as by original plaintiffs, and that "[a]n intervenor cannot step into the shoes of the original party unless the intervenor independently 'fulfills the requirements of Article III'") (quoting *Diamond*, 476 U.S. at 68);

cf. *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 617-619 (1989) (holding that, although Article III standing requirements do not apply in state-court litigation, a person who seeks this Court's review of a state-court judgment must demonstrate injury resulting from that judgment).

3. For the foregoing reasons, an Article III court can act only at the behest of a litigant who is injured either by the defendant's allegedly unlawful conduct or (in the case of federal appellate jurisdiction) by a lower court's judgment. It does not follow, however, that every person who seeks to participate as a plaintiff in multi-party federal litigation must invariably demonstrate injury in fact. The Court has repeatedly recognized that, so long as one plaintiff has established its standing to bring a particular suit, a federal court need not inquire into the standing of co-plaintiffs who assert the same legal claims and seek the same relief. *Massachusetts* v. *EPA*, 549 U.S. 497, 518 (2007); *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006); *Bowsher* v. *Synar*, 478 U.S. 714, 721 (1986); *Secretary of the Interior* v. *California*, 464 U.S. 312, 319 n.3 (1984); *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 44-45 (1974).[2]

The Court has applied the same approach to questions of standing on appeal. A federal appellate court can act only at the behest of an appellant who has a concrete ongoing interest in the litigation. See pp. 12-

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[2] This Court has permitted a person to intervene as a plaintiff even when no statute authorized him to initiate his own cause of action, as long as he limited his claims to those asserted by a plaintiff that did have a cause of action. *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 536-537 (1972).

13, *supra*. But where one appellant has made the requisite showing, the Court has found it unnecessary to decide whether additional appellants have standing as well. See, *e.g.*, *Horne* v. *Flores*, 557 U.S. 433, 446 (2009).

That approach is consistent with Article III's text, and it accords with common sense. If a dispute between opposing parties with concrete interests in the outcome otherwise qualifies as an Article III "Case[]" or "Controvers[y]," U.S. Const. Art. III, § 2, Cl. 1, the presence of an additional litigant, in and of itself, does not negate the requisite adversity. Most obviously, an amicus curiae that lacks Article III standing may present legal arguments to a court in the form of written submissions and may seek leave to participate in a hearing or oral argument. No one supposes that the participation of such a litigant negates the existence of an Article III "Case[]" or "Controvers[y]," *ibid.*, where one would otherwise exist. So long as the court resolves only those legal claims that are asserted by a plaintiff who has Article III standing, and enters only such relief as is appropriate to redress that plaintiff's injury, the court acts within the limits prescribed by the Constitution.

Article III does not require a different approach when multiple litigants are listed as plaintiffs and at least one is shown to have standing to sue. So long as a co-plaintiff does not seek to expand the range of claims or defenses before the court or request additional relief, its denomination as a party rather than as an amicus curiae does not violate Article III. An additional requirement that a court inquire into the standing of every litigant, including co-plaintiffs who assert the same claims and seek the same relief as a

plaintiff whose standing has been established, would burden already busy courts with an inquiry that could appropriately be left unaddressed in accordance with ordinary principles of constitutional avoidance. To be sure, a federal court has the *authority* to inquire into the standing of such a co-plaintiff if the court believes that such an inquiry would serve a useful purpose. But the court is *required* to verify a co-plaintiff's Article III standing only if and when the co-plaintiff seeks to take some step (*e.g.*, asserting a new legal claim or seeking additional relief) that would expand the range of claims or defenses before the court or increase the demands placed on other litigants.

4. As a constitutional matter, the same basic principles apply with respect to intervenors. Some actions that an intervenor might seek to take—such as injecting a new claim, seeking damages, or seeking injunctive relief that is broader than or different from the relief sought by the original plaintiff(s)—are permissible only if the intervenor establishes Article III standing. Other actions—such as presenting written or oral legal arguments supporting the claims of the original parties—would not require such a showing. Cf. *McConnell* v. *FEC*, 540 U.S. 93, 233 (2003) (finding it unnecessary to decide whether a defendant-intervenor had Article III standing because the intervenor's position was "identical" to that of the still-participating original defendant), overruled on other grounds by *Citizens United* v. *FEC*, 558 U.S. 310 (2010).

In principle, there are two basic approaches that courts could take to ensure that an intervenor who lacks Article III standing does not expand or alter the "Case[]" or "Controvers[y]" as framed by the original

parties. U.S. Const. Art. III, § 2, Cl. 1. First, courts could make standing a threshold requirement that the putative intervenor must satisfy in order to qualify for party status. Second, courts could choose instead to conduct the Article III inquiry only if and when the intervenor seeks to take some particular step for which standing is constitutionally required. For the reasons that follow, Federal Rule of Civil Procedure 24(a)(2) is best construed to mandate the first approach, and thus to make Article III standing a threshold requirement when a litigant moves to intervene as of right.

B. Properly Construed, Rule 24(a)(2) Requires A Litigant Who Seeks To Intervene As Of Right To Establish Article III Standing

As explained above, litigants who lack Article III standing often seek to influence the outcome of federal litigation. The constitutional propriety of such participation depends on whether those litigants act within the contours of a "Case[]" or "Controvers[y]," U.S. Const. Art. III, § 2, Cl. 1, that has been initiated by a plaintiff with Article III standing, not on whether they are denominated parties or amici. As a matter of sound judicial administration, however, there are good reasons for treating Article III standing as a prerequisite to intervention as of right in a pending federal-court suit. Federal Rule of Civil Procedure 24(a)(2) is best read to impose such a requirement.

1. Federal Rule of Civil Procedure 24(a)(2) requires a district court to grant a timely motion to intervene when a movant can establish (a) that the putative intervenor has "an interest relating to the property or transaction that is the subject of the action," (b) that the putative intervenor "is so situated

that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest," and (c) that existing parties do not "adequately represent that interest." Fed. R. Civ. P. 24(a)(2). Those prerequisites map comfortably onto constitutional standing requirements and should be interpreted to require a showing that at least satisfies the requirements for Article III standing.[3]

a. The first element of Article III standing is that a "plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations and quotation marks omitted). Rule 24(a)(2) likewise requires a putative intervenor as of right to establish "an interest relating to the property or transaction which is the subject of the action." *Donaldson* v. *United States*, 400 U.S. 517, 531 (1971) (citation omitted). This Court has described the "interest" that is "contemplated by Rule 24(a)(2)" as "a significantly protectable interest." *Ibid.* In this context, where a litigant seeks protection in the form of judicial process, Rule 24(a)(2)'s term "interest" is naturally understood to mean the type of "legally protected interest," *Lujan*, 504 U.S. at 560, that can form the basis of Article III standing and thereby authorize a federal court to exercise the judicial power.

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[3] Under Rule 24, a litigant seeking to intervene must file "a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). That pleading should assist a court in assessing whether a litigant satisfies the requirements of Rule 24(a)(2), including standing under Article III.

Rule 24(a)(2)'s further requirements that the intervenor's interest "relat[e] to the property or transaction that is the subject of the action," and that the disposition of the action "may as a practical matter impair or impede the movant's ability to protect its interest," reinforce the connection between the Rule and Article III. Fed. R. Civ. P. 24(a)(2). By requiring an interest relating to a judicial proceeding that is already in progress, the Rule assures that the intervenor's injury is an *actual* injury, not one that is "conjectural or hypothetical." *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560). The additional requirement of a potential "practical" impairment corresponds to the Article III requirement of an injury that is "concrete" rather than "abstract" and provides "the essential dimension of specificity to the dispute." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 220-221, 227 (1974). And the requirement that the suit may impair the intervenor's "ability to protect *its* interest," Fed. R. Civ. P. 24(a)(2) (emphasis added), ensures that its injury is particularized in the sense that it "affect[s] the [intervenor] in a personal and individual way," *Lujan*, 504 U.S. at 560 n.1, rather than in "some indefinite way in common with people generally," *Daimler-Chrysler*, 547 U.S. at 344 (citation omitted).

Rule 24(a)(2) is also naturally construed to incorporate the requirements of causation and redressability. A putative intervenor as of right must show that it "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest." Fed. R. Civ. P. 24(a)(2). The Rule thus requires a demonstrated causal link between the intervenor's legally protected interest and

the litigation itself. That aspect of the Rule, and the separate required showing that "existing parties" cannot "adequately represent" the putative intervenor's interest, also ensure that intervention as of right is limited to litigants who will receive a tangible benefit if the court considers and accepts their legal arguments. *Ibid.*

b. In one respect, the type of injury that will satisfy Rule 24(a)(2) can sometimes differ from the type of injury that a plaintiff must show in order to initiate a suit. Whereas a plaintiff must show that it has suffered or will suffer actual injury as a result of the defendant's allegedly unlawful conduct, an intervenor can satisfy Rule 24(a)(2) by demonstrating that it may suffer actual injury as a result of the disposition of the action in which it seeks to intervene. Rule 24(a)(2) thus allows a litigant to intervene as a defendant if it can demonstrate, *inter alia*, that its interest would be "impair[ed] or impede[d]" by a judicial ruling in the *plaintiff's* favor, even though the intervenor has not been injured by the defendant's conduct. Fed. R. Civ. P. 24(a)(2). Such a putative intervenor must demonstrate in substance that it would have Article III standing to appeal if the plaintiff prevailed in the district court.

As explained above, however, a litigant's philosophical agreement with the correctness of a defendant's legal position is not sufficient to establish standing on appeal. Rather, to pursue a stand-alone appeal, a litigant must establish that the lower court's ruling subjects it to the sort of concrete and personal injury that Article III requires. A litigant who seeks leave to

intervene as a defendant under Rule 24(a)(2) should be required to make a comparable showing.[4]

2. By its plain terms, Rule 24(a)(2) requires a putative intervenor as of right to demonstrate "an interest relating to the property or transaction that is the subject of the action." Fed. R. Civ. P. 24(a)(2). The court of appeals did not question the district court's determination that respondent lacked Article III standing to pursue its current claims in a stand-alone suit. See Pet. App. 5a-9a. In remanding this case to allow the district court to determine whether respondent nevertheless has the requisite Rule 24(a)(2)

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[4] The United States regularly intervenes in private disputes to advance or defend important federal interests. This Court has long recognized that "[t]he obligations which [the United States] is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court." *In re Debs*, 158 U.S. 564, 584 (1895). That sovereign interest has been incorporated into a number of statutes that provide for participation by the United States in litigation affecting the interests of the United States. See 28 U.S.C. 517, 518, 2403(a); Fed. R. Civ. P. 24(b)(2). Where the United States seeks to intervene as of right, it may rely on its unique sovereign interest in ensuring and coordinating the proper enforcement of its laws—just as it could assert the same sovereign interest as a ground for initiating suit or appealing from an adverse judgment. See *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (explaining that the United States suffers a cognizable "injury to its sovereignty arising from violation of its laws"); see also *Hollingsworth*, 133 S. Ct. at 2664 ("No one doubts that a State has a cognizable interest in the continued enforceability of its laws that is harmed by a judicial decision declaring a state law unconstitutional.") (citation and internal quotation marks omitted); *Diamond*, 476 U.S. at 64 ("The conflict between state officials empowered to enforce a law and private parties subject to prosecution under that law is a classic 'case' or 'controversy' within the meaning of Art[icle] III.").

"interest" in the subject matter of the suit, the court of appeals appeared to contemplate an inquiry that is similar to, but in some unspecified respect less demanding than, the inquiry that would be needed to ascertain whether respondent has Article III standing. See *id.* at 13a-17a. But if respondent were granted leave to intervene, and thereafter sought to assert a claim or seek relief different from those that Sherman has advanced (or if respondent sought to pursue a stand-alone appeal from an adverse district-court judgment on the merits), it would then be necessary to determine whether respondent actually has Article III standing.

There is no sound reason to interpret Rule 24(a)(2) as requiring the duplication of effort that such overlapping inquiries would entail. Rather, construing the Rule to require a threshold showing that satisfies the requirements for Article III standing is consistent with the most natural reading of the Rule's text and with principles of efficient judicial administration. That interpretation also obviates the need to decide whether Article III itself requires such a showing as a prerequisite to intervention as of right. Cf. *Southern Christian Leadership Conference* v. *Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984) (stating that Rule 24(a)(2) "impliedly refers not to *any* interest the applicant can put forward, but only to a legally protectable one," and that "[s]uch a gloss upon the rule is in any case required by Article III of the Constitution").

That approach is particularly appropriate in light of Rule 24(a)(2)'s separate requirement that the putative intervenor's asserted "interest" be one that "existing parties" cannot "adequately represent." Fed. R. Civ. P. 24(a)(2). A litigant who satisfies that requi-

rement is especially likely to seek to expand or alter the contours of the dispute between the existing parties in a way that would independently require an inquiry into Article III standing. The likelihood that such an inquiry will be required at some point during the action highlights the judicial-efficiency rationale for treating Article III standing as a required threshold showing when a litigant moves to intervene as of right.

3. A district court lacks discretion to exclude a putative intervenor that satisfies the requirements of Rule 24(a)(2). Rather, the Rule states that litigants who satisfy its requirements "must" be permitted to intervene. The court retains the ability to impose "appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." Fed. R. Civ. P. 24 advisory committee's note (1966) (Amendment) (28 U.S.C. App. at 823). In practice, however, intervenors as of right are generally permitted to participate in a case to the same extent as the original parties. 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1920, at 609 (3d ed. 2007).[5]

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[5] Petitioner's argument (Br. 15-32) that Article III requires an intervenor as of right to establish standing at the point of intervention is premised in part on an assumption that, once permitted to intervene under Rule 24(a)(2), an intervenor is entitled to do anything in the litigation that a plaintiff with standing can do—including adding a new claim or seeking a new form of relief—without an inquiry into the intervenor's independent standing. By its terms, Rule 24(a)(2) does not require that an intervenor be accorded the same treatment as a plaintiff with standing. We agree with petitioner, however, that if the effect of Rule 24(a)(2) intervention as of right were to preclude the district court from restricting the intervenor's litigation conduct once leave to inter-

Like any party to a suit, an intervenor may take steps that will slow the progress of the suit, increase the costs associated with the suit, or extend the suit's duration beyond what the original parties intended, such as by expanding discovery, complicating settlement negotiations, or influencing the original parties' decisions about whether to appeal. The legal system should not be made to bear such burdens except at the behest of a party with standing. As with plaintiffs who initiate suits in federal court, enforcement of standing requirements in this context reflects the traditional understanding of the proper judicial role and "a due regard for the autonomy of those persons likely to be most directly affected by a judicial order." *Valley Forge*, 454 U.S. at 473. And a threshold standing determination at the time of intervention will largely obviate the need for later inquiries into whether Article III authorizes the court to adjudicate particular claims or requests for relief that the intervenor asserts.

When an intervenor cannot establish the requisite concrete interest in and risk of harm from the pending litigation, it cannot intervene as of right under Rule 24(a)(2). In that situation, a district court has discretion pursuant to Rule 24(b) to grant a request for permissive intervention, so long as the putative intervenor does not seek to take an action that would require independent Article III standing as described above, see pp. 11-13, *supra*. Article III and efficiency concerns are less acute with respect to permissive intervention because a district court has discretion both to exclude an entity seeking to participate in that

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vene has been granted, the Constitution requires a demonstration of Article III standing as a threshold requirement for intervention.

capacity and to limit the scope of its participation if intervention is permitted. "Even highly restrictive conditions may be appropriately placed on a permissive intervenor, because such a party has by definition neither a statutory right to intervene nor any interest at stake that the other parties will not adequately protect or that it could not adequately protect in another proceeding." *Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370, 382 n.1 (1987) (Brennan, J., concurring in part and concurring in the judgment). But where a litigant asserts a right to participate in an action on substantially the same terms as the original parties, sound principles of judicial efficiency and constitutional avoidance support construing Rule 24(a)(2) to require that an intervenor establish Article III standing.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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In The
Supreme Court of the United States

TOWN OF CHESTER,

Petitioner,

v.

LAROE ESTATES, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICI CURIAE* OF AMERICAN FOREST RESOURCE COUNCIL, AMERICAN FARM BUREAU FEDERATION, PUBLIC LANDS COUNCIL, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, AND INTERNATIONAL ASSOCIATION OF GEOPHYSICAL CONTRACTORS IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae are trade associations that represent companies and families that help grow and produce the nation's food, wood products, and energy from forests, farms, rangelands, and oil and gas fields. Impeding the production of these resources is one of the central objectives of environmental groups that litigate under statutes such as the Endangered Species Act, Clean Water Act, and National Environmental Policy Act which govern production of natural resources, particularly on federal land. *Amici* or their members often are defendant-intervenors as of right under Federal Rule of Civil Procedure ("Rule") 24(a)(2) in these lawsuits which frequently implicate *amici's* interests through specific projects or nationwide rules.

Amici are concerned that a decision by this Court requiring Article III standing for intervention of right under Rule 24(a)(2) will severely limit intervention to *defend* against cases seeking to halt production from the country's forests, farms, rangelands, and oil and gas fields. *Amici* agree with Respondent that Article III standing is not a threshold requirement for intervention when there is an existing case or controversy. Amici write separately to highlight how

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[1] The Petitioner and Respondent have consented to the filing of this *amici* brief. Written consent has been obtained pursuant to Rule 37.3(a) and is lodged with the Clerk. Pursuant to Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that no party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief.

Petitioner's theory is an illogical and unduly restrictive interpretation of Rule 24(a)(2), particularly for defendant-intervenors in the context of environmental litigation over the use of natural resources involving projects and nationwide rules. There are also prudential standing issues. Although several Courts of Appeals have held that business interests have no standing as plaintiffs within the zone of interest of these statutes, they have found a right to intervene under Rule 24(a)(2) because of "an interest relating to the property or transaction that is the subject of the action" that "may as a practical matter" be impaired or impeded by the litigation.

The American Forest Resource Council ("AFRC") is a regional trade association whose purpose is to advocate for sustained yield timber harvests on public timberlands throughout the West to enhance forest health and resistance to fire, insects, and disease. AFRC promotes active management to attain productive public forests, protect adjoining private forests, and assure community stability. It works to improve federal and state laws, regulations, policies and decisions regarding access to and management of public forest lands and protection of all forest lands. AFRC represents over 50 forest product businesses and forest landowners throughout the West. Many of AFRC's members have their operations in communities adjacent to federal lands, and the management of these lands ultimately dictates not only the viability of their businesses, but also the economic health of the communities themselves.

AFRC and its members have been defendant-intervenors in nearly a hundred cases involving projects and regulations that threatened impairment of their interests in timber contracts, forest health, federal timber supply, and protection of their adjoining private forest land. An Article III standing requirement for intervention of right would significantly limit AFRC's ability to intervene as a defendant to protect these interests. AFRC's predecessors were members of the Northwest Forest Resource Council, the petitioner in one of the first cases to seek this Court's determination of the question now presented. *Northwest Forest Resource Council v. Portland Audubon Soc'y*, Petition No. 88-1751, 1989 WL 1174212 (1989).

The American Farm Bureau Federation ("AFBF") is a voluntary general farm organization with member state Farm Bureau organizations in all 50 states and Puerto Rico. As a grassroots organization, AFBF seeks to enhance and strengthen the lives of rural Americans and to build strong, prosperous agricultural communities. AFBF's members are farm and ranch families, who grow and raise every type of agricultural product in the nation, on private and federal lands. Both AFBF and its individual members have been directly affected by the interpretation of various environmental laws, in particular the Endangered Species Act and the Clean Water Act. Individually, AFBF's farm and ranch family members have intervened as of right under Rule 24(a)(2) in cases as defendants to defend their own water rights, federal grazing permits and use of private land intermingled with federal lands. As an organization, AFBF also intervenes as a defendant on behalf of

its members in cases challenging agency rules and interpretation of statutes. AFBF opposes any erosion of a defendant's right to intervene under Rule 24(a)(2).

The Public Lands Council ("PLC") is a national organization that represents ranchers who use public lands and preserve the natural resources and unique heritage of the West. PLC membership consists of state and national cattle, sheep, and grasslands associations. PLC members hold longstanding permits to graze on federal allotments and use roads across federal land to manage their private rangeland and vested water rights. PLC ranching families also own millions of acres of range and forest land. Litigation to halt public lands grazing and range improvements has proliferated during the last decade as have large fires on public rangeland that spread to private land. PLC and its members have been active as intervenors of right to defend against litigation challenging grazing and range management and do not support an interpretation of Rule 24(a)(2) that would require Article III standing for defendant-intervenors.

The National Cattlemen's Beef Association ("NCBA") is the national trade association representing the entire cattle industry. NCBA is an advocate for the economic, political, policy, and social interests of the United States cattle business. Many NCBA members own water rights, hold federal grazing permits, or own rangeland and forests intermingled with federal land and have intervened as of right to defend cases challenging these interests.

The International Association of Geophysical Contractors ("IAGC") is the global trade association representing all segments of the geophysical industry for both land and marine operations, essential to discovering and delivering the world's energy resources including oil and gas. IAGC strongly supports an interpretation of intervention of right under Rule 24(a)(2) that provides a right to defend a lawsuit that has the practical effect of attacking a contract, permit, or lease for energy production even though the contractor, permittee, or lessee would not technically have Article III standing if they were a plaintiff in the suit.

SUMMARY OF THE ARGUMENT

Petitioner Town of Chester makes the oversimplified, narrow, and unsupported contention that the only person that can ever appear in federal court as an intervenor of right under Fed. R. Civ. P. 24(a) is a person with Article III standing. The Town of Chester's interpretation of Rule 24 is not supported by the plain language of the Rule which provides a right to intervene if a person has "an *interest* relating to the *property* or *transaction* that is subject of the action" that "*may* as a *practical matter*" be impaired or impeded by the litigation. Rule 24(a)(2) (emphasis added). Petitioner ignores the broad range of interests that may suffice for a party to intervene as a defendant. Its simplistic view, if adopted, would endanger the ability of *amici* and others to defend their rights against plaintiffs aiming to extinguish those rights. The negative effects would

spread from *amici* to their employees, contractors, and surrounding communities.

Rule 24(a)(2) does not require a person to demonstrate, as does Article III, an actual or imminent injury from the challenged action because it is the outcome of the litigation a person seeks to join that may or may not impair the interest sought to be protected by intervention of right. Rule 24(a)(2) applies to litigation that has already been initiated and for which there is already a case or controversy. Neither the Constitution nor the Rule support a holding that an intervenor to an existing case must demonstrate Article III standing.

Petitioner entirely ignores the basic principle that a defendant in a lawsuit is not required to have standing to be sued. *Amici* are often intervenors of right as defendants in cases under environmental statutes that are filed against the federal government related to federal timber contracts, grazing permits, oil and gas leases, or intermingled private land in which *amici* have an interest. *Amici* also often intervene as of right as defendants in cases where broadly applicable environmental rules are challenged that affect *amici's* interests. The narrow interpretation of Rule 24(a)(2) urged by Petitioner would exclude a person from exercising a right to become a defendant-intervenor under Rule 24(a)(2) when a plaintiff files a suit challenging a federal rule, contract, permit, or lease for the use of federal natural resources. The interpretation will upend the commonly-held judicial interpretation of Rule 24(a)(2) that a person has a right to intervene to defend

a contract, permit, lease or a rulemaking affecting *amici's* regulated interests under a wide variety of environmental statutes such as the National Environmental Policy Act, even if the proposed defendant-intervenor may not have standing if it sought to be a plaintiff.

ARGUMENT

A. The Requirement of Article III Standing for a Plaintiff to Sue in Federal Court Does Not Apply to a Defendant That Appears in Federal Court to Defend the Suit.[2]

For Article III standing a plaintiff must demonstrate an (1) "injury in fact," that is (2) "fairly traceable" to defendant's actions, and (3) the injury will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). These threshold requirements to initiate a lawsuit simply do not apply to a defendant who becomes a party to the case through the complaint. Although a defendant does not have Article III standing, the defendant is entitled

[2] *Amici* are trade associations that commonly move to intervene on behalf of their members who often cannot afford to engage in litigation individually. An association has standing to sue on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc.*, 528 U.S. 167, 181 (2000) (citing *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)).

to file motions, engage in discovery, and participate in oral argument just like the plaintiff.

Litigation involving environmental statutes often involves federal agency rules or decisions to permit livestock grazing, harvest timber, or explore and produce oil, gas, and minerals. A private party seeking to defend a particular lawsuit brought under environmental statutes supporting agency action will never have an "injury in fact" for Article III standing but could have an interest relating to the property or transaction subject to the lawsuit that may be impaired and which is not adequately represented providing the right to intervene under Rule 24(a)(2). *Amici's* interests are often "interests in property" and therefore "the most elementary type of right that Rule 24(a) is designed to protect." 7C Charles Alan Wright et al., Fed. Prac. & Proc. Civ., § 1908.1 (3d ed.). The current rule poses a simple and direct question: "will the disposition of the action impair as a practical matter the absentee's ability to protect an interest in the property or transaction upon which the suit is based?" *Id.* § 1907. Petitioner's unduly narrow interpretation of the Rule is not consistent with this purpose.

The issue of what qualifies as a sufficient "interest" under Rule 24(a)(2) should not be governed by a

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An association may intervene on behalf of its members so long as it shows "(1) members have a legally protectable interest sufficient for intervention; (2) the defense of the [decision is] germane to the associations' purposes; and (3) individual [members] are not necessary participants in the suit." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 n.3 (9th Cir. 2001).

bright-line Article III standing requirement. The Advisory Committee for the 1966 amendments explained that the amendments were designed in part to address the unduly restrictive view that intervention of right was limited to specific disposition of property such as a fund. The Committee noted the greater flexibility under amended Rule 24(a)(2) and that "if an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule be entitled to intervene and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of." Fed. R. Civ. P. 24 advisory committee's notes (1966) (Amendment), 28 U.S.C. App. at 822. This Court cited the Advisory Committee explanation in its first case applying Rule 24(a)(2) and concluded that "some elasticity was injected" by the amendment and the question was to determine how much in a particular case. *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 134 (1967).

In *San Juan Cty., Utah v. United States*, 503 F.3d 1163 (10th Cir. 2007) (*en banc*), the *en banc* Tenth Circuit also interpreted the interest inquiry as "intended to capture the circumstances in which the practical effect on the prospective intervenor justifies its participation in the litigation. Those factors are not rigid, technical requirements." *Id.* at 1195. The court held that environmental groups had a protectable interest in the County's quiet title action against the federal government regarding the use of a road entitling it to intervene as of right because if the County prevailed,

additional traffic might flow through Canyonlands National Park. The *en banc* court noted that if the County's claim was rejected, then the litigation would not injure the interests of the applicants for intervention. *Id.* at 1200. But the court found "this possibility is irrelevant. Otherwise, every application to intervene on the side of one of the parties would be rejected on the ground that the aligned party might win (and the applicant's interest would hence not be injured). The purpose of intervention is to increase the likelihood of that victory." *Id.* Similarly, *amici* often seek to intervene to increase the likelihood that their interests will be protected even though they do not necessarily meet the concrete, imminent injury requirement for Article III standing.

Petitioner Town of Chester's position that a right to intervene must always be supported by Article III standing would upend long-standing intervention law in environmental cases. A few examples are illustrative.

First, consider a farmer who has a water right to take water from a creek on federal land that is inhabited by fish listed as endangered under the Endangered Species Act ("ESA"). 16 U.S.C. §§ 1531-44. The Forest Service is sued by an environmental group under the ESA arguing that the Forest Service is compelled to conduct Section 7 consultation with the National Marine Fisheries Service over whether the water withdrawal by the farmer will harm the endangered fish, jeopardize the species, or cause destruction or adverse modification of critical habitat. 16 U.S.C.

§ 1536. Although the farmer may not have an Article III injury, the farmer has an interest in the water right that may be impaired if plaintiffs prevail and a lengthy ESA consultation process ensues imposing conditions to benefit the fish. *See Western Watersheds Project v. Matejko*, 468 F.3d 1099 (9th Cir. 2006) (case seeking to compel consultation under the ESA for a water right).

Second, a case is filed against the Bureau of Land Management challenging a timber sale under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq*. and the Federal Land Policy and Management Act. 43 U.S.C. §§ 302 *et seq*. The purchaser of the timber sale does not have Article III standing because the company actually benefits, rather than is injured, by the harvest of its timber sale contract. However, if plaintiff prevails, the purchaser's interest in timber harvest will be impaired and it should have a right to intervene to defend its interest. *See Cascadia Wildlands v. Bureau of Land Mgmt.*, No. 6:12-CV-00095-AA, 2012 WL 6738275 (D. Or. Dec. 21, 2012).

Third, a rancher has a permit to run cattle on a Forest Service grazing allotment. A suit is filed by an environmental group arguing that the Forest Service needs to meet specific state water quality standards for each grazing allotment under the Clean Water Act ("CWA") before the cattle are allowed on the range for the upcoming grazing season. The rancher does not have Article III standing in the pending case because she is not raising the claim under the CWA and will not be injured if she can graze the number of cattle permitted for the season. However, her interest in

grazing the cattle will be impaired if plaintiff prevails; thus the rancher satisfies the interest and impairment prongs for intervention under Rule 24(a)(2). *See, e.g.*, *Oregon Wild v. U.S. Forest Serv.*, 193 F.Supp.3d 1156, 1169-71 (D. Or. 2016). Similarly, trade associations representing farmers and ranchers should be able to intervene as of right in defending a suit by environmental groups challenging an EPA amendment to relax nationwide regulations under the Clean Water Act which would affect interests in their farms and ranches even though the associations may not be "injured" under Article III by relaxation of the regulations.

Finally, a private landowner would benefit from a road improvement and fuel reduction project in a dying stand of timber on adjoining national forest land. The project would allow easier access to her land, provide a more rapid escape route in the event of a fire, and the removal of the dying timber on the national forest would reduce the risk that insects or wildfire would spread from the national forest onto her healthy, thinned forest. A lawsuit is filed claiming that the Forest Service did not survey for certain rare species on the national forest as required by the National Forest Management Act ("NFMA"). 16 U.S.C. §§ 1604-12. The landowner has no Article III injury resulting from the lack of species surveys under NFMA, but has an interest in maintaining the health of the neighboring national forest to protect her private land which will be impaired if plaintiff halts the fuel reduction project. *See* 16 U.S.C. § 1611(b) ("Nothing in subsection (a) of

this section shall prohibit the Secretary from salvage or sanitation harvesting of timber stands which are substantially damaged by fire, windthrow, or other catastrophe, or which are in imminent danger from insect or disease attack.").

Requiring proposed defendant-intervenors to demonstrate Article III standing to intervene as of right under Rule 24(a)(2) is not required by the plain language of the Rule. This is especially true for an individual or association with members with legitimate interests relating to the subject of the lawsuit that seeks to intervene as a defendant to prevent impairment of that interest. The Court should decline to impose a one-size-fits-all Article III standing requirement for all proposed intervenors under Rule 24.

B. Courts Have Rejected Unfounded Hurdles to Intervention as a Defendant.

In resolving the issue presented about whether Article III standing is required for intervention of right under Rule 24(a)(2), *amici* urge the Court to avoid imposing a new groundless threshold for a person to intervene as a defendant. A defendant has a fundamentally different role in litigation and by which it becomes a party to a lawsuit. To bring suit, a plaintiff must have Article III standing and prudential standing under the statute that is the basis for the claim for relief. In contrast, standing is a concept that does not apply to a defendant unless the defendant raises a new claim. A defendant is commonly brought into the case

based on federal court jurisdiction through diversity of citizenship and the amount in controversy (28 U.S.C. § 1332(a)) or the presence of a federal question. *Id.* § 1331. Federal question jurisdiction is commonly cited by plaintiffs for suits under environmental statutes such as NEPA, the ESA, and the CWA. A plaintiff-intervenor must file a complaint in intervention to support its motion while a defendant-intervenor files an answer in intervention. Rule 24(c) ("The motion must . . . be accompanied by a pleading that sets out the claim or defense for which intervention is sought."). A plaintiff often sues under an environmental statute through the Administrative Procedure Act ("APA"), where it must demonstrate that it is "adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702; *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882-83 (1990). In contrast, the defendant-intervenor is not aggrieved by the agency action but has an interest benefited by the action.

The issue of a jurisdictional requirement for permissive intervention under Rule 24(b) is instructive in assessing whether Article III standing should be required under Rule 24(a). In the context of permissive intervention, courts formerly held that an independent basis for jurisdiction was required. For example, the Ninth Circuit long held that permissive intervention "requires (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action." *Beckman Indus., Inc. v. Int'l Ins. Co.*,

966 F.2d 470, 473 (9th Cir. 1992). However, nearly 20 years later, the court clarified that the independent ground for jurisdiction does not apply to proposed intervenors, such as a defendant-intervenor in federal-question cases where the proposed intervenor is not raising new claims. *Freedom from Religion Foundation, Inc. v. Geisler*, 644 F.3d 836, 844 (9th Cir. 2011); *see* 7C Charles Alan Wright et al., § 1917 (3d ed.) ("In federal-question cases there should be no problem of jurisdiction with regard to an intervening *defendant* nor is there any problem when one seeking to intervene as a plaintiff relies on the same federal statute as does the original plaintiff.") (emphasis added).

Another example involving a defendant-intervenor formerly being subjected to an intervention requirement that goes beyond the plain language of Rule 24(a)(2) was the "none but the federal defendant rule" imposed by the Ninth Circuit. *Wilderness Society v. United States Forest Service*, 630 F.3d 1173 (9th Cir. 2011) (*en banc*). In *Wilderness Society*, the court addressed whether persons seeking to intervene as defendants in a NEPA case were prohibited from intervening as of right under the theory that NEPA is a procedural statute that only binds the federal government so that a private party could never have a right to intervene in a NEPA case. *Id.* at 1177. The *en banc* panel rejected the argument that the federal defendant rule precluded intervention of right in NEPA cases. The court explained that it was joining its sister circuits that also held private parties could be intervenor-defendants in a NEPA case. *WildEarth*

Guardians v. U.S. Forest Serv., 573 F.3d 992 (10th Cir. 2009); *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964 (3rd Cir. 1998); *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994); *Wilderness Soc'y v. Morton*, 463 F.2d 1261 (D.C. Cir. 1972) (per curiam). The Third Circuit in *Kleissler* explained that "[t]he reality is that NEPA cases frequently pit private, state, and federal interests against each other. Rigid rules in such cases contravene a major premise of intervention – the protection of third parties affected by pending litigation." *Kleissler*, 157 F.3d at 971. Intervention jurisprudence has previously recognized unsupported roadblocks to intervene as a defendant and this Court should reject imposing Article III standing as yet another unsupported new threshold for intervention not found in the plain language of Rule 24(a)(2).

C. If Article III Standing Is Required for Intervention Under Rule 24(a)(2), Then Prudential Standing Would Also Be Required and Could Eliminate *Amici's* Right to Intervene in Cases Involving NEPA and Many "Environmental" Statutes.

The question of standing is not limited to Article III and "involves both constitutional limitations on federal-court jurisdiction and prudential limits on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (citation omitted). Prudential standing addresses the "zone of interests" under the particular statutes comprising the claims in the complaint. *See Nat'l Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S.

479, 503-04 (1998). Prudential standing is of particular concern to *amici* if it also becomes a requirement to intervene as of right as a defendant. *See* Public Natural Resource Law § 8:22 (2d ed.) ("Economic and developmental interests face perhaps the most difficulty in meeting the zone of interest test in public natural resource litigation, at least when the statutes at issue are viewed as environmental and natural resource protection measures.").

If this Court requires Article III standing for intervention, it implies that prudential standing should also be required. A prudential standing requirement would eliminate *amici's* right to intervene in the multitude of NEPA cases designed to halt management of federal lands involving livestock grazing, timber sales, and oil and gas leases. *See Business as Usual? Analyzing the Development of Environmental Standing Doctrine Since 1976*, 5 Harv. L. & Pol'y Rev. 289, 291 (2011) ("business cases challenging NEPA rulings to injuries to the business' economic interests are often dismissed under the zone-of-interest test."). Many of the projects being challenged involve forest health projects to avoid the spread of insects, disease, and wildfire which can harm the quality of water used by the ranchers and farmers downstream of the national forests. A prudential standing requirement for intervention of right is of great concern to *amici* in cases brought under NEPA.

First, NEPA is the statute of choice for environmental litigants challenging management of federal lands including the national forests. *See Miner et al.*,

Twenty Years of Forest Service Land Management Litigation, 112 J. Forestry 32 (2014). Over 70% of the cases involving national forest management involved NEPA claims. *Id.* at 37.

Second, many courts have held that economic interests are not within the zone of interests of NEPA and that "the purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions." *Nevada Land Action Ass'n v. United States Forest Service*, 8 F.3d 713, 716 (9th Cir. 1993) (holding that an association comprised of ranchers that grazed livestock on Forest Service lands did not have standing to challenge a forest plan for failure to comply with NEPA); *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 937 (9th Cir. 2005); *see Lower Arkansas Valley Water Conservancy District v. United States*, 578 F.Supp.2d 1315, 1338 (D. Colo. 2008) (noting that "it is well established that purely economic injuries do not fall within the 'zone of interest' protected by NEPA."); *see also County of St. Louis v. Thomas*, 967 F. Supp. 370, 377 (D. Minn. 1997) (denying standing to plaintiffs to raise NEPA claim for economic losses); *Gunpowder Riverkeeper v. F.E.R.C.*, 807 F.3d 267, 274 (D.C. Cir. 2015).[3]

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[3] The court in *Gunpowder* also held that economic harm "does not fall within the zone of interests that Congress sought to protect in enacting the CWA [Clean Water Act]." *Gunpowder*, 807 F.3d at 275 (internal quotation marks omitted) (quoting *BP Exploration & Oil, Inc. v. EPA*, 66 F.3d 784, 803 (6th Cir. 1995)). Thus, *amici* would have no right to intervene as defendants in litigation

Third, as explained above, NEPA cases challenge agency actions that if halted will impair *amici's* interests in permits, leases, contracts, and adjoining private land in which courts have granted intervention of right under Rule 24(a)(2). This Court has emphasized that NEPA is a procedural statute that does not dictate substantive environmental results. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). However, in assessing prudential standing, courts have incorrectly viewed NEPA as a substantive environmental statute that prohibits standing for a person with an economic interest. This leads to the unsupported legal result that a person with an economic interest that has exercised the right to engage in agency NEPA procedures during the public comment period, is precluded from later advancing in court its concern as a plaintiff over inadequate NEPA procedures. In contrast, environmental groups have access to both the administrative and judicial forums. This creates an inequitable dichotomy under NEPA and other environmental laws where there is equal access to the administrative process but not equal access to the courts. So, if this Court holds that Rule 24(a)(2) requires Article III and prudential standing, *amici* may no longer have a right to intervene as defendants in these cases even if their contract or lease is the subject of the NEPA claim. The outcome of NEPA cases greatly influence the production of natural resources from public lands. *See Cascadia Wildlands v. U.S. Forest Serv.*, 937

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challenging a CWA rule benefiting their members' farms and forests.

F.Supp.2d 1271 (D. Or. 2013) (halting multiple timber sale contracts from the Willamette National Forest in Oregon representing the entire annual timber supply of the Forest). In the context of environmental statutes, an Article III standing requirement could eliminate the right to intervene of businesses which often have the most direct stake in the outcome of litigation. To the extent that the litigation involves injunctive relief requiring a balance of the equities, economic interests will be excluded from the balance of harm.

D. Article III Standing for Intervention Under Rule 24(a) Is Not Necessary for Courts to Control the Scope of Litigation and Manage Cases with Multiple Parties.

There is no merit to Respondent's argument that without the Article III limits on Rule 24(a)(2) intervention, the judicial system will be significantly burdened by intervenors. Brief for Petitioner at 45-46. First, Rule 24(a) sets forth requirements of (1) timeliness, (2) an interest relating to the property or transaction, (3) that as a practical matter will be impaired or impeded, and (4) is not adequately represented by existing parties. These are sufficient threshold requirements that have precluded, and will continue to preclude, intervention of right.

Second, this Court has suggested that reasonable limits may be imposed on an intervenor of right to control the litigation in the same manner as an original

party. *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 383 (1987) (Brennan, J., concurring); Fed. R. Civ. P. 24 advisory committee's note (1966) (Amendment), 28 U.S.C. App. at 823 ("An intervention of right under the amended rule [24(a)] may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of proceedings."); 7C Charles Alan Wright et al., Fed. Prac. & Proc. Civ., § 1920 (3d ed.). For example, courts often require multiple intervenors to coordinate briefing or share the fixed oral argument time with federal defendant.

Finally, the United States acknowledges that a bright-line rule of Article III standing for intervention is not appropriate. It may apply in some instances where a proposed intervenor attempts to expand the litigation to inject a new claim, seek additional damages, or seek injunctive relief broader than the original plaintiff. Brief of the United States as *Amicus Curiae* Supporting the Petitioner at 16. It makes no sense to require a separate showing of Article III standing when the proposed intervenor pursues the same claims and relief as a party whose standing is undisputed.

E. The United States Is Not a Neutral Party Regarding Whether Article III Standing Is Required for Intervention Under Rule 24(a).

There are ulterior motives to the United States' support for an Article III intervention requirement. The government is the most frequent defendant

involving environmental lawsuits under federal question jurisdiction where private parties seek to intervene as defendants. The United States supports a narrow scope of intervention to further its interests in having complete control of the defense and in advancing only its interpretation of the federal statutes. The government is also the party that brings enforcement actions under environmental statutes and seeks to be the only party to a case interpreting the statutory enforcement provisions. Rule 24(a)(2) provides that if a court finds that an existing party will adequately represent a proposed intervenor's interest, there is no right to intervene. In many cases, courts hold that if the federal government is already a defendant, there is a presumption of adequacy of representation. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (the presumption of adequate representation that arises when the government is acting on behalf of a constituency it represents must be overcome by a "very compelling showing").[4] The existing framework of the Rule establishes a hurdle to a proposed defendant-intervenor to intervene as of right when the United States is a defendant. Therefore, there is not a need to impose an Article III standing requirement to protect

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[4] The growth of the government presumption in the Courts of Appeals appears to have little basis in this Court's jurisprudence. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972), held the burden is "minimal." Ninth Circuit caselaw, including *Arakaki*, developed from *Com. of Pa. v. Rizzo*, 530 F.2d 501, 505 (3rd Cir. 1976), which relied on dictum from *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689 (1961), decided before the 1966 amendments to Rule 24.

the desire of the United States to control the defense of the litigation.

CONCLUSION

The Court should reject the Town of Chester's interpretation of Rule 24(a)(2) that requires any person moving to intervene as of right to have Article III standing. A more nuanced interpretation of Rule 24(a)(2) is called for, particularly when it involves a person moving to intervene as of right as a defendant who cannot demonstrate standing, but who satisfies the plain language of the Rule and claims an interest relating to the property or transaction that may as a practical matter be impaired or impeded by the outcome of the litigation.

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IN THE

Supreme Court of the United States

TOWN OF CHESTER,

Petitioner,

v.

LAROE ESTATES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* PROFESSOR AARON-ANDREW P. BRUHL IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amicus is a law professor at William & Mary Law School. His teaching and research interests include federal courts and federal jurisdiction, and he has recently written an article that addresses some of the issues raised in this case. *See* Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 DUKE L.J. (forthcoming 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2901122. *Amicus* has an interest in the clarification and sound development of the law of federal jurisdiction, and he submits this brief to assist the Court in understanding how the Court's ruling on the particular question at issue in this case relates to broader principles of the law of standing.[1]

SUMMARY OF ARGUMENT

The question presented in this case—whether an intervenor-plaintiff requires Article III standing to sue—represents one aspect of the broader question whether all plaintiffs in a multiple-plaintiff case require standing to sue. Respondent Laroe Estates, Inc., which seeks to intervene as a plaintiff, relies heavily on a string of cases in which this Court has stated that it need not inquire into the standing of every plaintiff in a case after it has found one plaintiff with standing. *See* Br. in Opp. to Pet. for Writ of Cert. at 17.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or his counsel made a monetary contribution to the brief's preparation or submission. *Amicus* files this brief in his personal capacity and does not speak for his employer. The parties have consented to the filing of this brief.

This brief addresses the question whether all participating plaintiffs in a case, including intervenor-plaintiffs like Laroe, must demonstrate Article III standing. The answer is *yes*. The relevant case law, a proper understanding of Article III, and practical considerations all support reversal of the Second Circuit's ruling that Laroe could intervene without demonstrating standing. Reversal is appropriate on either of two grounds.

The cleanest and clearest way to resolve this case is to hold that all participating plaintiffs in a case should be required to have standing, regardless of what issues they present or what relief they seek.[2] In a case with multiple plaintiffs, one good plaintiff is not good enough for an Article III court. Instead, all plaintiffs need standing. The idea that "one good plaintiff is enough" is untenable in light of cases like *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332 (2006), and *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998). These cases establish that Article III requires a granular approach to standing that prohibits one finding of standing from being shared

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[2] *Amicus* uses the term "*participating* plaintiffs" to distinguish unnamed plaintiffs in class actions. Class actions present different issues in light of their representative nature. Moreover, class actions present complications because heterogeneity of injury within a plaintiff class has implications for class certification as well as for standing. The Court need not address standing requirements for unnamed class members in class actions to resolve the question of participating-plaintiff standing in this case. *Cf. Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1049 (2016) (noting that the Court granted certiorari to consider issues involving the standing of class members but did not reach those issues because the petitioner changed its argument in its merits briefing).

across separate claims, remedies, or, as relevant here, plaintiffs. Furthermore, requiring all plaintiffs to have standing would not compromise pragmatic values that might be thought to justify a truncated standing analysis. To the contrary, it is allowing standingless plaintiffs into a case that leads to impracticality and licenses absurd results.

In any event, even if the presence of one plaintiff with standing is *sometimes* sufficient to permit other plaintiffs to participate in a federal case, that rule does not apply in a case like this one. This Court requires individualized standing inquiries when plaintiffs may raise distinct issues or seek monetary relief. A party without Article III standing, if tolerated at all, certainly is not permitted to expand the controversy or obtain a monetary judgment, so the decision of the Second Circuit can also be reversed on that narrower ground.

ARGUMENT

The question presented in this case—whether an intervenor-plaintiff requires Article III standing to sue—is one version of a broader question, namely whether all participating plaintiffs in a multiple-plaintiff case must demonstrate Article III standing. Respondent has expressly drawn the connection between the particular matter of intervenor standing at issue here and the broader question. Br. in Opp. to Pet. for Writ of Cert. at 17-19. This Court too has linked the two questions, such as by citing cases from one of the contexts as authorities in the other context. *See McConnell* v. *FEC*, 540 U.S. 93, 233 (2003) (citing *Clinton* v. *City of New York*, 524 U.S. 417, 431 n.19 (1998), and *Bowsher* v. *Synar*, 478 U.S. 714, 721

(1986), which involved multiple plaintiffs but not intervention).

The correct answer to the question of intervenor-plaintiff standing before the Court flows from the correct answer to the general question of plaintiff standing: intervenor-plaintiffs require standing because all participating plaintiffs require standing. That would be a simple, bright-line rule, the kind of rule that courts find especially valuable in matters of jurisdiction. *See, e.g.*, *Hertz Corp.* v. *Friend*, 559 U.S. 77, 92, 94 (2010). There is, in addition, a narrower rule that the Court could adopt to dispose of this case: Additional plaintiffs require Article III standing when their inclusion in the case introduces new issues or requires plaintiff-specific remedies.

I. AT A MINIMUM, PLAINTIFFS WHO PRESENT DISTINCT ISSUES OR DEMAND DAMAGES REQUIRE ARTICLE III STANDING.

This Court has stated in a number of cases that it need not consider the standing of all plaintiffs as long as one plaintiff has standing. *E.g.*, *Massachusetts* v. *EPA*, 549 U.S. 497, 518 (2007); *Clinton*, 524 U.S. at 431 n.19; *Bowsher*, 478 U.S. at 721. But it has not treated that concept as a mandatory rule, nor has it applied it in all cases. *See Susan B. Anthony List* v. *Driehaus*, 134 S. Ct. 2334, 2343-47 (2014) (analyzing standing of both plaintiffs and finding that both had standing); *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181-83 (2000) (analyzing standing of each plaintiff organization and finding that all three had standing). Indeed, there are two thresholds over which the cases that dispensed with examining the standing of each plaintiff have not

crossed: allowing plaintiffs who have not demonstrated standing to seek separate relief or alter the issues presented. The Court should, at the very least, hold that line and reverse the decision below, which ventures into new territory by allowing intervention when the court has not resolved whether the intervenor will assert new remedies or issues.

First, the cases in which the presence of one Article III plaintiff has been deemed sufficient to license the participation of other plaintiffs who may lack standing have been cases involving generalized declaratory and injunctive relief, typically cases in which the plaintiffs challenged statutes, regulations, or other governmental policies as unlawful. *E.g.*, *Clinton*, 524 U.S. at 425 n.9, 431 n.19 (declaratory relief concerning constitutionality of Line Item Veto Act); *see also Nat'l Ass'n of Optometrists & Opticians* v. *Brown*, 567 F.3d 521, 523 (9th Cir. 2009) ("As a general rule, in an injunctive case this court need not address standing of each plaintiff if it concludes that one plaintiff has standing."). When this Court declares a statute or regulation void, that ruling has precedential force throughout the country. Such a ruling therefore has the practical effect of settling the matter for all persons, whether they were parties to this Court's decision or not. In light of that practical effect, it is understandable, even if not necessarily consistent with standing doctrine, *see infra* Part II, for the Court not to expend the effort to determine the standing of all participants when it does not appear to affect the outcome of the litigation.

When damages are sought, by contrast, the impropriety of awarding money to a plaintiff without standing is hard to miss. And so, unsurprisingly,

plaintiff-by-plaintiff standing inquiries are necessary in damages cases. *See* MARTIN H. REDISH, MOORE'S FEDERAL PRACTICE – CIVIL § 101.23 (3d ed. 2016) ("[O]nce a court determines the existence of one plaintiff with standing, at least when generalized equitable relief is sought, it need not consider whether other plaintiffs also have standing to assert that claim. Of course, in order to qualify for the award of damages each plaintiff must establish injury.")

Although not every intervenor seeks an award of damages, or even intervenes as a plaintiff, Laroe appears to be an example of an intervenor who does. In its proposed complaint in intervention, Laroe would join the case as a plaintiff and demand compensatory damages for a regulatory taking of its asserted interest in the property. J.A. 148 (referring to itself as "Plaintiff"); *id.* at 162 ("WHEREFORE, Laroe prays that this Court grant judgment against the Defendants awarding *it* damages and other appropriate relief as follows . . . An award of compensation for the *taking of Laroe's interest in the subject real property* . . . ." (emphasis added)). Even if Sherman and Laroe both want "the same relief" in the sense that both plaintiffs want money judgments as compensation, judgments benefit and burden *specific people*. That is no trifling matter. *See, e.g.*, *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 463-68 (2000) (holding that due process prohibited the amendment of the judgment and the pleadings to add a corporate party's sole shareholder as an additional party to the judgment). Given the person-specific nature of judgments, it is hard to see how *Sherman's* Article III injury could authorize a judgment—backed by the power of the United States—in *Laroe's* name (either singly or jointly), when the court has not satisfied

itself that Laroe is a proper Article III plaintiff. If an entity wants an Article III judgment in its favor, it needs an Article III injury.

Second, the Court has been comfortable truncating its standing inquiry in cases in which all plaintiffs present the same issues for decision.[3] But when different plaintiffs present different issues, the Court has been more exacting, so as to ensure that it does not decide issues that are presented only by plaintiffs who may lack standing. For instance, in *Lewis v. Casey*, the Court considered the propriety of an injunction ordering Arizona to improve the law libraries throughout its prison system and to take

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[3] *E.g.*, *McConnell* v. *FEC*, 540 U.S. 93, 233 (2003) ("It is clear, however, that the Federal Election Commission (FEC) has standing, and therefore we need not address the standing of the intervenor-defendants, whose position here is identical to the FEC's); *Sec'y of Interior* v. *California*, 464 U.S. 312, 319 n.3 (1984) ("Since the State of California clearly does have standing, we need not address the standing of the other respondents, whose position here is identical to the State's"); *Gen. Bldg. Contractors Ass'n, Inc.* v. *Pennsylvania*, 458 U.S. 375, 402 (1982) ("Petitioners have not challenged the standing of the other plaintiffs and, therefore, even if Pennsylvania lacks standing, the District Court possessed Art. III jurisdiction to entertain those common issues presented by all plaintiffs."); *Buckley* v. *Valeo*, 424 U.S. 1, 12 (1976) (stating that "[i]n our view, the complaint in this case demonstrates that at least some of the appellants have a sufficient personal stake in a determination of the constitutional validity of each of the challenged provisions" (footnote and internal quotation marks omitted)); *see also Cal. Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 44-45, 67-70 (1974) (bypassing a plaintiff-by-plaintiff standing analysis in a section of the opinion in which the same issues were presented by each plaintiff but conducting separate standing inquires in a later section of the opinion where the plaintiffs presented different issues).

other steps to protect inmates' access to the courts. 518 U.S. 343, 346-47 (1996). The 22 plaintiffs were prisoners who had sued as representatives of a class composed of all Arizona prisoners. But only two prisoners, both of them illiterate or nearly so, had been found by the district court to have suffered adverse consequences (such as dismissal of a case) due to inadequate access to legal resources. *Id.* at 357-59. As the Court explained, the fact that illiterate prisoners had suffered injury did not allow such persons to obtain relief for prisoners whose circumstances differed, such as prisoners who did not speak English, those held in lockdown, or those in the general prison population. *Id.*[4]

Again, this case illustrates the distinction. Even assuming that exactly the same acres of dirt are at issue in both plaintiffs' takings claims, the two plaintiffs' allegedly compensable *interests* in the dirt necessarily present different questions. That is especially true in light of the nature of a regulatory-takings analysis. The determination whether Laroe is entitled to recover for a regulatory taking of its alleged interest involves consideration of (among other things) the nature of Laroe's interest (if any), when the purported interest vested, whether the Town's actions sufficiently thwarted Laroe's purported reasonable investment-backed expectations, and whether Laroe obtains any offsetting benefits to other holdings. *See Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332

[4] The Court further held that the district court's order of system-wide relief in favor of illiterate prisoners was excessive given the limited evidence of system-wide violations, though this last ruling was not based on Article III standing. *Id.* at 359-60 & n.7.

(2002) (observing that a regulatory-takings claim usually requires an ad hoc "fact specific inquiry"). Laroe therefore does not appear to claim to occupy a position that is "identical" to its co-plaintiff's. *See Sec'y of Interior* v. *California*, 464 U.S. 312, 319 n.3 (1984) (dispensing with plaintiff-by-plaintiff standing inquiry where plaintiffs had "identical" positions).

In short, one might summarize the Court's cases this way: when it appears to matter that a case contains multiple plaintiffs, the Court ensures that all of the plaintiffs have standing. Here it matters, and this case presents an opportunity for the Court to emphasize that an intervenor-plaintiff must have standing at least when it arguably seeks separate relief and raises different issues from the plaintiff who demonstrated standing.[5]

II. ALL PARTICIPATING PLAINTIFFS NEED ARTICLE III STANDING.

A. Allowing One Plaintiff to Rely on Another Plaintiff's Standing Is Inconsistent with Basic Requirements of Standing Doctrine.

The Court should go one step further and clarify that *all* participating plaintiffs must in all cases demonstrate standing. Allowing courts to stop their standing inquiry after finding one proper plaintiff is inconsistent with standing doctrine, even in cases in which all plaintiffs present the same issues and remedies. Such a practice is inconsistent with the rest of standing law and inconsistent with the appropriate scope of federal judicial power. Disapproving the

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[5] *Amicus* takes no position on whether Laroe in fact has standing.

concept of "one good plaintiff" would enhance the coherence of standing law. Furthermore, requiring that all participating plaintiffs have standing does not compromise the aims of judicial economy that are said to justify pretermitting standing for supernumerary plaintiffs.[6]

1. It is fundamental to the properly limited nature of the federal judicial power that the federal courts do not grant relief to plaintiffs who do not present a "case or controversy." The precedential effect of an opinion applies to everyone within the reasoning's scope and the court's jurisdiction, but judgments bind only particular people. *See Taylor* v. *Sturgell*, 553 U.S. 880, 903-04 (2008); *Stryker* v. *Crane*, 123 U.S. 527, 539-40 (1887). Because judgments are person-specific exercises of judicial power, an additional plaintiff requires standing even when that person seeks the same relief and presents the same issues for decision as a proper plaintiff. *See Vt. Agency of Nat. Res.* v. *U.S. ex rel. Stevens*, 529 U.S. 765, 779 (2000) (pretermitting a jurisdictional question of Eleventh Amendment immunity by explaining that doing so would not "permit the court to pronounce upon any issue, *or upon the rights of any person*, beyond the issues *and persons* that would be reached" otherwise (emphasis added)); *see also Tyson Foods, Inc.* v.

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[6] The same rule should apply to other kinds of parties who invoke federal judicial power, such as appellants and petitioners. All of them need standing, just as all plaintiffs do. *Cf. Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2661 (2013) (explaining that invoking federal appellate review requires standing to do so); *Diamond* v. *Charles*, 476 U.S. 54, 64-71 (1986) (dismissing appeal where appellant lacked standing and party who had standing did not appeal).

Bouaphakeo, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.").

Allowing joinder of standingless plaintiffs leads to absurdities. A person who is attentive, sensitive, and litigious enough could then be an intervenor-plaintiff in hundreds of cases every year. Provided just one plaintiff in each of the cases has standing, this putative plaintiff's own standing need never be shown—and he or she could participate in discovery and other activities and even win favorable judgments. That could not be right. As one court of appeals observed in ruling that intervenors require standing, "a federal case is a limited affair, and not everyone with an opinion is invited to attend." *Mausolf* v. *Babbitt*, 85 F.3d 1295, 1301 (8th Cir. 1996). "The more the merrier" may be a good principle for party hosts, but not for federal courts.

2. To the extent one could try to square the notion of standingless participating plaintiffs with the demands of Article III, the most logical argument would be that the initial plaintiff and defendant establish the requisite "case or controversy" and that additional plaintiffs, so long as their claims are transactionally related to the existing dispute, can attach their claims to that constitutionally sufficient case. That is, the argument analogizes to the concept of supplemental jurisdiction now codified at 28 U.S.C. § 1367. But this attempt to defend the rule of "one good plaintiff" cannot survive contact with basic principles of standing doctrine.

The Court rejected the notion of "ancillary standing" in *DaimlerChrysler Corp. v. Cuno*, 547 U.S.

332 (2006). The plaintiffs in that case challenged the legality of both a state tax credit and a municipal tax exemption. The Court held that the plaintiffs lacked standing to challenge the state tax credit. *Id.* at 346. The plaintiffs' then claimed that their (assumed) standing to challenge the municipal tax exemption gave them a form of "ancillary standing" that would nonetheless allow them to bring their challenge to the state tax credit, which arose from the same set of operative facts. *Id.* at 351-53. The Court rejected the plaintiffs' argument, ruling instead that every claim must have its own basis for standing. *Id.* at 352. "[S]tanding," the Court emphasized, "is not dispensed in gross." *Id.* at 353 (quoting *Lewis* v. *Casey*, 518 U.S. 343, 358 n.6 (1996)). The Court's ruling in *DaimlerChrysler* coheres with other decisions that take a granular approach to standing, such as cases holding that plaintiffs must demonstrate standing separately for each form of relief they seek. *See Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). The reasoning underlying *DaimlerChrysler* applies to parties just as much as it applies to claims. It is antithetical to well-ordered Article III jurisdiction to allow courts to hear and decide claims from parties that do not present their own case or controversy. Courts already have a vehicle through which interested parties who lack standing may participate—*amicus* briefing.

Allowing joinder of standingless plaintiffs is also incompatible with this Court's rejection of "hypothetical jurisdiction" in *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998). According to the erstwhile doctrine of hypothetical jurisdiction, a federal court could "proceed immediately to the merits [of the case], despite jurisdictional objections,

at least where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied." *Id.* at 93. In other words, the doctrine licensed a court to skip over a complicated jurisdictional question in order to rule against the plaintiff(s) on the merits. The particular jurisdictional question in *Steel Co.* was one of Article III standing. *Id.* at 102. The Court rejected hypothetical Article III standing, and hypothetical jurisdiction more generally, because a court without authority cannot lawfully decide the merits at all, even if only to decide the merits against a plaintiff who, upon careful inquiry, may have also lost on jurisdictional grounds. *Id.* at 94-95. To resolve the merits in the absence of jurisdiction is, "by very definition . . . to act *ultra vires*." *Id.* at 102.

The rule of "one good plaintiff" operates similarly to the rejected doctrine of hypothetical jurisdiction: if a court is going to decide the merits anyway due to the presence of one plaintiff with standing, the thinking goes, then resolving complicated standing issues for co-plaintiffs is a waste of effort. But even if the "one good plaintiff" rule serves judicial economy, that benefit cannot justify skipping over standing, for to do so is, as *Steel Co.* teaches, to act without authority.

Indeed, the doctrine urged by Laroe would do something that the doctrine of hypothetical jurisdiction would never had contemplated in its wildest dreams. In cases like *Steel Co.*, the plaintiff was going to lose one way or the other, and the only question was whether the loss would be based on jurisdiction or merits. Laroe hopes to *win* on the

merits without demonstrating it has Article III standing. This is hypothetical jurisdiction on stilts.

3. The Court does not appear to have attempted to explain how Article III could ever allow a court to rest content with finding one good plaintiff in a multiple-plaintiff case. The more recent cases pretermitting the standing of some parties tersely refer to previous cases, frequently in one sentence, often in a footnote. But even when one traces back through the chain of citations, one does not find an attempt to explain the constitutional basis for allowing a plaintiff who may lack standing to participate in a federal case.

The closest thing to a justification that *amicus* could identify in this Court's cases is this passage in *Doe v. Bolton*, one of the early cases to bypass a plaintiff-by-plaintiff standing inquiry:

> We conclude that we need not pass upon the status of these additional appellants in this suit, for the issues are sufficiently and adequately presented by Doe and the physician-appellants, and nothing is gained or lost by the presence or absence of the nurses, the clergymen, the social workers, and the corporations.

410 U.S. 179, 189 (1973). The implicit theory here appears to be that a finding of standing makes no practical difference, and so the analysis can be skipped, presumably as a matter of judicial convenience. *Doe*, like the other cases in which the Court has employed the one-plaintiff approach, was not a case in which the Court granted review in order to clarify or modify the law of standing; rather, standing was addressed on the way to addressing the

merits question that was the Court's focus. *See generally* Bruhl, *supra*, at 18-22 (tracing the relevant history).

B. Skipping Over the Standing of Additional Plaintiffs Creates Practical Problems.

An interest in judicial economy cannot overcome the requirements of Article III, as *Steel Co.* and many other cases show. But even setting that crucial point aside, the supposedly pragmatic argument for truncating the standing inquiry fails on its own terms. Its fatal defect is the premise that the standing of other plaintiffs has no practical significance when one proper plaintiff has been found, at least in cases seeking injunctive or declaratory relief. That premise is incorrect, as exemplified in cases where plaintiffs win and the question of entitlement to attorneys' fees and costs then arises. Even courts otherwise willing to bypass plaintiff-by-plaintiff standing inquiries usually recognize the need to verify every plaintiff's standing when such awards are at issue. *E.g.*, *Bethune Plaza, Inc.* v. *Lumpkin*, 863 F.2d 525, 531 (7th Cir. 1988); *Women's Med. Ctr. of Providence, Inc.* v. *Roberts*, 512 F. Supp. 316, 319-20 (D.R.I. 1981). *But see* Bruhl, *supra* at 24-25 (citing cases in which courts awarded fees or costs to parties who never showed standing). Questions about who can enforce injunctions may raise similar concerns about whether all plaintiffs really have standing. *E.g.*, *Planned Parenthood of Idaho, Inc.* v. *Wasden*, 376 F.3d 908, 918 n.6 (9th Cir. 2004). If a court merely postpones a ruling on standing until a point when party-specific details come to the fore, the work has not been eliminated but just pushed off until later, all the while

keeping an improper party as a participant in the case.

When additional plaintiffs will eventually *lose* on the merits (which, of course, often cannot be known ahead of determining their standing), the pragmatic argument for pretermitting standing has more practical appeal, but here too the gains can prove illusory. Different consequences attach to jurisdictional losses versus merits losses, such as different preclusive effects in later litigation. 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4436 (2d ed. 2002) (explaining that a dismissal for lack of standing does not preclude later litigation of the same claim, provided the lack of standing can be overcome in the second suit). For that reason, it may be unclear what preclusive effect to give a purportedly merits-based ruling regarding a plaintiff whose standing was bypassed. *See* Bruhl, *supra*, at 40-41 (describing uncertainty over preclusive effects when courts bypass standing). On the one hand, if the first judgment is open to reexamination in a later suit, or if uncertainty over the judgment's preclusive effects merely breeds later litigation, then the court has undermined the efficiency rationale for pretermitting standing. On the other hand, to treat the first court's determination of the merits as fully binding would be jarring given the real doubt about the plaintiff's standing to invoke federal jurisdiction. These are two bad options. Choosing the path of immediate expediency often sows the seeds of future confusion.

C. Requiring All Plaintiffs to Have Standing Is Not Impractical and Does Not Unduly Burden Courts.

Inconvenience is sometimes the necessary cost of complying with Article III, but requiring that all participating plaintiffs have standing does not impose significant burdens on the courts. There are even some practical benefits.

First, when the plaintiffs in a case are similarly situated (e.g., voters in an unlawfully drawn district, businesses subject to an industry-wide regulation), the parties' standing inquiries will all be parallel, and so a court can easily handle them *en bloc*. *E.g.*, *Sprint Commc'ns Co., L.P.* v. *APCC Servs., Inc.*, 554 U.S. 269 (2008); *FEC* v. *Akins*, 524 U.S. 11 (1998); *Bennett* v. *Spear*, 520 U.S. 154 (1997). In each of the cases just cited, and many others, there were multiple plaintiffs but only one standing analysis.

Second, once it is clear that all participating plaintiffs need standing, parties with questionable standing will have less incentive to try to ride along as additional plaintiffs in a suit that has a clearly injured plaintiff. The burden of establishing standing is on the plaintiffs at every stage, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *McNutt* v. *Gen. Motors Acceptance Corp.*, 298 U.S. 178, 188–89 (1936), and so supernumerary plaintiffs will face the costs of collecting affidavits, spending pages of briefing on the question, and the like. Riding along would no longer be free.

Third, even when some plaintiffs in a case do present distinctive and difficult standing issues, the court will not always have to rule on them. Although

courts must not ignore standing, courts do possess some flexibility in managing a case's progression. A court of appeals may remand for further proceedings on the standing of one plaintiff while addressing the merits as to others. In that scenario, the contemplated proceedings on remand will often prove unnecessary, as the case will settle in light of the merits ruling as to the proper plaintiff. Similarly, if a district court rules that one plaintiff has standing but requests additional briefing regarding another plaintiff, or notes during a preliminary conference that such a course is possible, the defendant might agree to settle the case or the other plaintiffs might voluntarily dismiss themselves rather than attempt to prove their own standing to seek the generalized relief that is usually at issue in these cases. *See* Bruhl, *supra*, at 49-51 (describing how courts should handle cases with multiple plaintiffs).

Fourth, requiring that all plaintiffs have standing would not deprive the public of judicial decisions on important matters. In the multiple-plaintiff cases at issue, there already is another litigant who has standing. So the same merits issues can be resolved regardless.

Fifth, although pretermitting a difficult standing decision yields a short-run benefit in the case at hand, it does so at the cost of depriving the legal system of precedent. Precedent on close questions of standing has value for the public and other courts.

Sixth, the quality of the litigation process would not suffer if plaintiffs lacking standing were excluded. One might worry about the situation in which the would-be plaintiff without standing is a well-equipped interest group while the co-plaintiff with standing is

an unsophisticated (but concretely and particularly injured) individual. But as in other cases, there are ways to compensate for weak plaintiffs. For instance, the sophisticated party can file briefs as *amicus curiae* or provide *pro bono* representation to the injured-but-under-resourced party.

D. Requiring That All Plaintiffs Have Standing Would Not Cause Unfairness.

Disapproving the mistaken notion that some federal plaintiffs can "borrow" a co-plaintiff's standing would not visit any unfairness on putative plaintiffs. The generic group composed of "persons who lack a constitutionally cognizable harm" could hardly have ordered their affairs around the prospect of becoming a plaintiff when, and only when, they encounter a pending federal suit that already has one good plaintiff. *Cf. Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009) (rejecting a judge-made procedure governing the sequencing of issues for decision, which "[did] not affect the way in which parties order their affairs"). The supernumerary plaintiffs who would be barred are *by definition* persons who could not invoke Article III jurisdiction on their own. They are, so far as Article III is concerned, mere bystanders, bystanders who nonetheless seek a federal-court judgment by virtue of the pendency of a case between proper parties. The Court need not protect a bystander's opportunity to interject itself into someone else's dispute.

Further, and finally, any possibility of unfairness shrinks to nil given that pretermitting standing after finding one good plaintiff has been treated as a discretionary *option* for the courts. That is, courts say that they "*need not* consider" whether all plaintiffs in a case have standing to sue when all present the same

issue, *e.g.*, *Clinton* v. *City of New York*, 524 U.S. 417, 431 n.19 (1998) (emphasis added), but there is no *prohibition* on undertaking a plaintiff-by-plaintiff inquiry.[7] This Court has not always stopped with one plaintiff, even when it probably could have done so according to the "one good plaintiff" approach used in other cases. *E.g.*, *Susan B. Anthony List* v. *Driehaus*, 134 S. Ct. 2334, 2343-47 (2014); *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181-83 (2000). Some possibly standingless plaintiffs, though not all, have gotten lucky in the past, but there is no entitlement to good fortune.

* * *

In short, it is widely understood that a plaintiff must have standing for each of its claims and for each form of relief it seeks; so too, a plaintiff needs standing even to lose on the merits. *DaimlerChrysler*, 547 U.S. at 351-53; *Friends of the Earth*, 528 U.S. at 185; *Steel Co.*, 523 U.S. at 101-02. In light of all that, it cannot be that a federal plaintiff may pursue a judgment without having Article III standing, merely because a co-plaintiff has standing. Neglecting to require all

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[7] *E.g.*, *Thiebaut* v. *Colo. Springs Utils.*, 455 F. App'x 795, 802 (10th Cir. 2011) ("[C]ourts retain discretion to analyze the standing of all plaintiffs in a case and to dismiss those plaintiffs that lack standing."); *We Are Am./Somos Am. Coalition of Ariz.* v. *Maricopa Cty. Bd. of Supervisors*, 809 F. Supp. 2d 1084, 1091 (D. Ariz. 2011) (court was "[not prohibited] from considering the standing of the other plaintiffs even if it finds that one plaintiff has standing."); *see also Florida ex rel. McCollum* v. *Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1148 (N.D. Fla. 2010) (addressing standing of all plaintiffs "for the sake of completeness"), *aff'd in part and rev'd in part*, 648 F.3d 1235, 1243 (11th Cir. 2011), *aff'd in part and rev'd in part sub nom. Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566 (2012).

participating plaintiffs to demonstrate standing may falsely appear to serve judicial economy, but in fact it both offends Article III and ignores the inefficiencies that anomalous practice creates.

CONCLUSION

For these reasons, the judgment below should be reversed.

Respectfully submitted,

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IN THE

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TOWN OF CHESTER,

Petitioner,

v.

LAROE ESTATES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AND INSTITUTE FOR JUSTICE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and in the Constitution's guarantee of access to the courts.

Amicus Institute for Justice is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: property rights, economic liberty, educational choice, and freedom of speech. It frequently represents parents as defendant-intervenors in educational choice litigation, where someone sues to strike down an educational choice program and the parents intervene because they intend to use the program for their children. *See, e.g.*, *Zelman v. Simmons-Harris*, 436 U.S. 639 (2002). It also represents entrepreneurs as defendant-intervenors in cases challenging regulatory reforms, where the intervenors are able to start businesses only because of the regulatory reforms under challenge. *See, e.g.*, *Ill. Transp. Trade Ass'n v. City of Chicago*, 839 F.3d 594 (7th Cir.

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or its counsel made a monetary contribution to its preparation or submission.

2016); *Joe Sanfelippo Cabs, Inc. v. City of Milwaukee*, 839 F.3d 613 (7th Cir. 2016). *Amicus* Institute for Justice has an interest in this case because intervention in the aforementioned cases is frequently the best way for the individuals it represents to protect their interests. If the plaintiffs in those cases were to succeed, it is possible that the parties *amicus* Institute for Justice represents might then have a cause of action, but they would be faced with a case on the same topic, recently decided the other way (and in which they were unable to present evidence). Even if they won any serial lawsuit they might bring, they would still lose years of a better education for their children or better business prospects. For them, intervention is a far better choice, allowing them to present their case when a court is already deciding the issues, thus saving time for the court and all parties.

SUMMARY OF ARGUMENT

Over a decade ago, Steven Sherman, now deceased, attempted to obtain approval from the Town of Chester to develop a nearly 400-acre piece of land he had purchased for $2.7 million. His efforts proved futile, however, as the Town kept changing its zoning regulations, repeatedly forcing Sherman to change his proposal. Ultimately frustrated by the mounting costs of his efforts, Sherman sold his property to Laroe Estates. He also sued the Town of Chester, alleging that it unlawfully prevented him from developing his land and thereby took his property without paying just compensation in violation of the Fifth and Fourteenth Amendments. Because of its legal interest in the property in question, Laroe moved to intervene in Sherman's takings case, asserting the same claim and seeking the same relief as Sherman. The Town, however, asserts that Laroe is not entitled to intervene in this case, despite its ownership of the property at stake,

unless it can demonstrate that it possesses Article III standing. This effort to constitutionalize intervention is wrong and misguided. It would cut standing law loose from its moorings in Article III's case or controversy requirement and wreak havoc with well-established rules governing intervention.

Rule 24 of the Federal Rules of Civil Procedure provides that, "[o]n timely motion, the court must permit anyone to intervene" who either has "an unconditional [statutory] right to intervene"; or "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a). Rule 24 further provides that "[o]n timely motion, the court may permit anyone to intervene" who has "a conditional [statutory] right to intervene" or "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). Under these rules, entities and organizations across the ideological spectrum have intervened—both on the side of plaintiffs and defendants—in many cases. *See, e.g.*, *Diamond v. Charles*, 476 U.S. 54 (1986) (pediatrician intervened to defend constitutionality of state regulation of abortion); *Shaw v. Hunt*, 517 U.S. 899 (1996) (registered voters intervened, some to strike down districting plan, some to defend it); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (students intervened to defend constitutionality of race-conscious admissions process); *Massachusetts v. EPA*, 549 U.S. 497 (2007) (state and local governments intervened on both sides of the case); *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013) (civil rights groups intervened to defend constitutionality of Voting Rights Act); *United States v. Windsor*, 133 S.

Ct. 2675 (2013) (Bipartisan Legal Advisory Group of the House of Representatives intervened to defend constitutionality of Defense of Marriage Act).

Petitioner, however, insists that Rule 24 is unconstitutional to the extent it permits intervention by those who lack Article III standing, claiming that because "[a]n intervenor exercises the same rights as an original party," a "court may not authorize a person to exercise those rights unless she has Article III standing." Pet'r Br. at 5. The Town claims that its insistence that every intervenor must possess Article III standing "will not work a sea change in litigation practices," but will merely ensure that "as our Founders intended, the scarce resources of the judiciary . . . are spent only 'in the last resort, and as a necessity in the determination of real, earnest and vital controversy.'" Pet'r Br. at 50 (quoting *Chi. & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892)). This is wrong on both counts. Constitutionalizing intervention does nothing to advance the goals of Article III—which are satisfied when a single plaintiff demonstrates that there is a "'real, earnest and vital controversy,'" *id.*—and it will radically remake intervention law, displacing the rules for intervention set forth in Rule 24 and forcing courts to weigh in on difficult questions of standing whenever a litigant seeks to enter an existing case or controversy.

Article III of the Constitution limits the jurisdiction of the federal courts to certain "Cases" or "Controversies." This Court's decisions have long held that "the core component of standing is an essential and unchanging part of the case-and-controversy requirement of Article III," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992), reflecting that "[i]f a dispute is not a proper case or controversy, the courts have no business

deciding it, or expounding the law in the course of doing so." *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). Here, Sherman's suit against the Town for taking his property is plainly a case or controversy as required by Article III, and the question is whether Laroe Estates, which has a substantial interest in the property in question, may join this case to raise an identical takings claim. No further showing of Article III standing is required. As the United States recognizes, "[i]f a dispute between opposing parties with concrete interests in the outcome otherwise qualifies as an Article III 'Case[]' or 'Controvers[y]', the presence of an additional litigant, in and of itself, does not negate the requisite adversity." U.S. Br. at 15.

Moreover, the Town's claim that any litigant who seeks to intervene must independently possess Article III standing to join an existing Article III case or controversy runs headlong into a host of problems. First, for decades, this Court has held that when one plaintiff has Article III standing, it need not consider whether other plaintiffs do so as well. *See, e.g., Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *Horne v. Flores*, 557 U.S. 433, 446 (2009). This Court has applied the same reasoning to intervention, refusing to consider whether intervenors that sought to defend the constitutionality of challenged statutes on appeal had Article III standing because defendants clearly did. *McConnell v. FEC*, 540 U.S. 93, 233 (2003), *overruled in part on other grounds, Citizens United v. FEC*, 558 U.S. 310 (2010); *Windsor*, 133 S. Ct. at 2687-88 (holding that, because the United States had standing to appeal, "the Court need not decide whether BLAG would have standing to challenge the District Court's ruling and its affirmance in the Court

of Appeals on BLAG's own authority"). The Town's argument that any litigant must have Article III standing to be a party would render this longstanding practice unconstitutional.

Second, the Town's sweeping Article III argument would render permissive intervention unconstitutional in most if not all cases, taking away the discretion that the Federal Rules give district courts to allow interested parties to intervene based on a showing that they have a "claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). The Town would tie the hands of district court judges, insisting that a party could intervene permissively only on the condition that the litigant "not independently invoke the court's authority in any way." Pet'r Br. at 49. This would, of course, impose a far-reaching limitation on permissive intervention.

Third, the Town's argument would require district courts to create a new body of standing law to decide whether a party who seeks to intervene on the defendant's side satisfies Article III standing. Currently, district courts do not ask whether the defendant has standing when a case is filed. While there is a body of law concerning a defendant's standing to appeal, the Town's sweeping view of Article III would force district judges to determine at the outset of a case whether a litigant who wants to join in defending against plaintiff's suit has standing to do so. No good reason exists for requiring courts to decide these often difficult questions about standing—which occasionally arise when the named defendant and a defendant-intervenor disagree, *see, e.g.*, *Diamond*, 476 U.S. at 64-68—in every case in which a litigant seeks to intervene as a defendant.

In sum, there may or may not be reasons to deny Laroe the right to intervene in this case, but Article III of the Constitution surely is not one of them. The court of appeals correctly declined the Town's invitation to constitutionalize the law governing intervention, and its judgment should be affirmed.

ARGUMENT

I. A LITIGANT SEEKING TO INTERVENE IN AN EXISTING CASE OR CONTROVERSY NEED NOT ESTABLISH ARTICLE III STANDING.

Article III of the Constitution broadly extends the "judicial Power" to nine categories of "Cases" and "Controversies," including "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." U.S. Const. art. III, § 2, cl. 1. Article III's plain language empowers the "judicial department" to "decide all cases of every description, arising under the constitution or laws of the United States," extending to the federal courts the obligation "of deciding every judicial question which grows out of the constitution and laws." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 382, 384 (1821).

This Court has long held that Article III's limitation on cases and controversies requires a plaintiff to establish standing to sue. "'One element of the case-or-controversy requirement' is that plaintiff 'must establish that they have standing to sue.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)). To satisfy the case-or-controversy limitation and invoke the jurisdiction of the federal courts, "a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal con-

nection between the injury and the conduct complained of', and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Lujan*, 504 U.S. at 560-61). The case-or-controversy limitation ensures that Article III courts "exercise judicial review and interpret the Constitution . . . in the course of carrying out the judicial function of deciding cases." *Daimler Chrysler*, 547 U.S. at 340. "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *Id.* at 341.

The Town argues that Article III standing requirements also apply when a litigant seeks to intervene in an already existing case or controversy, insisting that "a party may not invoke the judicial power . . . unless she has standing." Pet'r Br. at 13. Because intervenors become parties to the case, the Town claims that they must "demonstrate standing, and the constitutional principles that Article III protects depend on the strict enforcement of this constitutional command." *Id.* at 29. The Town's argument cannot be squared with the text of Article III and would cut standing doctrine loose from its moorings in the case-or-controversy requirement.

The doctrine of Article III standing concerns whether "a matter before the federal courts is a proper case or controversy under Article III," *Daimler Chrysler*, 547 U.S. at 341, and therefore "serves to identify those disputes which are appropriately resolved through the judicial process," *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). That is why this Court has called the "core component of standing" an "essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan*, 504 U.S. at 560.

The question of intervention is fundamentally different. It does not concern at all whether a case may be heard by the judiciary, but rather whether third parties that possess a "significantly protectable interest," *Donaldson v. United States*, 400 U.S. 517, 531 (1971), in the subject matter of the litigation may participate in circumstances in which they may not be adequately represented by the existing parties. As this Court's case law demonstrates, the range of interests that support intervention as of right is broad, and includes interests that might not be sufficient to create a case or controversy. *See Diamond*, 476 U.S. at 68 (noting that "certain public concerns" may support intervention as of right); *Trbovich v. United Mine Workers*, 404 U.S. 528, 537-39 (1972) (permitting union member to intervene in Secretary of Labor's suit to set aside union election); *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 135 (1967) (permitting State of California and a gas company disadvantaged by sale of a company to intervene in an antitrust suit to protect "the public interest in a competitive system"); *cf. Arizona v. California*, 460 U.S. 605, 614 (1983) (permitting Indian Tribes to intervene in original suit between states "to participate in an adjudication of their vital water rights"). Permissive intervention, which "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation," *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459 (1940), allows for even broader intervention in the discretion of the district court judge. This helps ensure efficient use of scarce judicial resources, permitting all interested parties to join together in one case. *See* Resp't Br. at 9 (observing that intervention "promotes the expeditious resolution of related claims").

Because a party seeking to intervene in litigation is, by definition, seeking to enter an existing "case or controversy," Article III's requirements have necessarily already been satisfied, and there is no reason to require a putative intervenor to independently show that she has standing. Indeed, there is no textual basis in Article III for such a requirement. Article III requires a case or controversy—and therefore provides a constitutional warrant for standing doctrine—but it does not limit who may intervene in an existing case or controversy.

The Town's own *amici* effectively recognize this point. As the United States argues, "[i]f a dispute between opposing parties with concrete interests in the outcome otherwise qualifies as an Article III 'Case[]' or 'Controvers[y],' the presence of an additional litigant, in and of itself, does not negate the requisite adversity." U.S. Br. at 15 (quoting U.S. Const. art. III, § 2, cl. 1). The United States observes that "an amicus curiae that lacks Article III standing may present legal arguments to a court in the form of written submissions and may seek leave to participate in a hearing or oral argument. No one supposes that the participation of such a litigant negates the existence of an Article III 'Case[]' or 'Controvers[y],' where one would otherwise exist." *Id.* This same reasoning applies to litigants who intervene in a case because they have an interest in the subject matter of the litigation that is not being adequately represented by the parties.

To be sure, in some circumstances, intervenors need Article III standing to take certain actions. For example, an intervenor cannot appeal an adverse judgment on his or her own without satisfying Article III standing requirements. Thus, in *Diamond*, this Court held that a pediatrician who had intervened to defend the constitutionality of state laws regulating abortion

could not appeal from a judgment striking down those statutes. "Had the State sought review, . . . Diamond, as an intervening defendant below, also would be entitled to seek review . . . . But this ability to ride 'piggyback' on the State's undoubted standing exists only if the State is in fact an appellant before the Court; in the absence of the State in that capacity, there is no case for Diamond to join." 476 U.S. at 64; *see Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) ("An intervenor cannot step into the shoes of the original party unless the intervenor independently 'fulfills the requirements of Article III.'" (quoting *Diamond*, 476 U.S. at 68)); *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016) (same). When one of the original parties drops out of the litigation, the intervenor must have standing to ensure there continues to be a case or controversy, as Article III requires. This exception proves the rule: generally an intervenor need not satisfy Article III standing to join an existing case or controversy.

The Town observes that "an intervenor without standing might pour a vast quantity of time and money into suit in the district court, only to be left in the cold when the parties with standing elect not to appeal an unfavorable judgment." Pet'r Br. at 42. According to the Town, it would be "[f]ar better to simply resolve" the question of Article III standing, "up front, when the interest question is already squarely presented to the court." *Id.* But, in our system of government, the power of the courts to interpret the meaning of the Constitution is grounded in the "necessity to do so in the course of carrying out the judicial function of deciding cases." *Daimler Chrysler*, 547 U.S. at 340. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is

that [courts] ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944); *see Clinton v. Jones*, 520 U.S. 681, 690 (1997) (explaining that "the importance of avoiding the premature adjudication of constitutional questions . . . is applicable to the entire Federal Judiciary"). The Town's argument would require districts courts to adjudicate prematurely difficult questions of Article III standing without any warrant in the case-or-controversy requirement to do so. A solution that requires courts to multiply by ten-fold unnecessary constitutional rulings cannot be right.

II. THIS COURT HAS PERMITTED PARTIES TO INTERVENE IN AN EXISTING CASE OR CONTROVERSY WITHOUT SATISFYING ARTICLE III STANDING REQUIREMENTS.

The Town dismisses as "facile" the fact that "the text of Article III is satisfied so long as some 'case' or 'controversy' exists." Pet'r Br. at 30. But this Court has closely hewed to the text of Article III in its past cases, repeatedly holding that one plaintiff with standing is sufficient to create a case or controversy, and has permitted litigants to intervene without considering whether they had Article III standing. The implication of the Town's argument is that, in so doing, this Court has been deciding cases in a manner that flouts the Constitution. This is just one of a host of problems that the Town's argument would introduce into the law.

To start, this Court's precedent positively refutes the Town's claim that "a party may not invoke the judicial power . . . unless she has standing." Pet'r Br. at 13. For decades, this Court has held that when one plaintiff has Article III standing, and therefore a case

or controversy exists, it need not consider whether other plaintiffs do so as well. *See, e.g.*, *Village of Arlington Heights*, 429 U.S. at 263-64 ("As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners' alleged discrimination. . . . But we need not decide whether the circumstances of this case would . . . permit MHDC to assert the constitutional rights of its prospective minority tenants. For we have at least one individual plaintiff who has demonstrated standing to assert these rights as his own."); *Bowsher*, 478 U.S. at 721 ("A threshold issue is whether the Members of Congress, members of the National Treasury Employees Union, or the Union itself have standing to challenge the constitutionality of the Act in question. It is clear that members of the Union . . . will sustain injury by not receiving a scheduled increase in benefits. This is sufficient to confer standing under . . . Article III. We therefore need not consider the standing issue as to the Union or Members of Congress."); *Horne*, 557 U.S. at 446 ("Because the superintendent clearly has standing to challenge the lower courts' decisions, we need not consider whether the Legislators also have standing to do so."); Resp't Br. at 18-20.

The holding of these cases, which "is consistent with Article III's text" and "accords with common sense," U.S. Br. at 15, makes clear that "[a]n additional requirement that a court inquire into the standing of every litigant, including co-plaintiffs who assert the same claims and seek the same relief as plaintiff whose standing has been established, would burden already busy courts with an inquiry that could appropriately be left unaddressed in accordance with ordinary principles of constitutional avoidance." *Id.* at 15-16. Because one plaintiff with standing creates an Ar-

ticle III case or controversy, a court need not separately analyze the standing of other plaintiffs, even though plaintiffs whose standing is not addressed in the case will have the authority to invoke the judicial process in all the ways the Town complains of. *See* Pet'r Br. at 23-24.

These same principles apply equally to motions to intervene, as this Court's precedents establish. In *McConnell*, members of Congress intervened to defend the constitutionality of federal campaign finance laws. The plaintiffs in the case insisted that these members of Congress should not have been allowed to intervene because they lacked Article III standing. But this Court held that, because the Federal Election Commission had standing, "we need not address the standing of the intervenor-defendants, whose position here is identical to the FEC's." *McConnell*, 540 U.S. at 233.

In *Windsor*, this Court, once again, permitted intervenors to participate as parties to a case without considering whether they could satisfy Article III's standing requirements. In that case, the Bipartisan Legal Assistance Group of the U.S. House of Representatives was permitted to intervene to defend the Defense Against Marriage Act after the Executive Branch refused to defend it. This Court held that, because the United States had standing to appeal from the judgment ordering it to pay a refund to Windsor, "Article III requirements are met here; and, as a consequence, the Court need not decide whether BLAG would have standing to challenge the District Court's ruling and its affirmance in the Court of Appeals on BLAG's own authority." *Windsor*, 133 S. Ct. at 2688.

These cases establish that an intervenor need not possess Article III standing to intervene. In both cases, this Court held that the intervenors could "ride 'piggyback,'" *Diamond*, 476 U.S. at 64, on the standing

of the existing parties, concluding that plaintiff's lawsuit against the defendant "establishe[d] a controversy sufficient for Article III jurisdiction." *Windsor*, 133 S. Ct. at 2686. This Court did not independently analyze the standing of the intervenors—as the Town insists the Constitution requires. As these cases show, an intervenor may participate in an existing case or controversy without demonstrating that he or she meets Article III's standing requirements. The Town's arguments cannot be squared with *McConnell* and *Windsor*.

The Town's unsupported view of Article III would not only render this Court's settled practice unconstitutional, it would result in a radical revision of Rule 24, sharply limiting the scope of judicial authority to permit intervention and thus curbing federal trial courts' discretion under Rule 24. While the Town's brief focuses on intervention as of right, *see* Pet'r Br. at 15-32, its sweeping view of the demands of Article III cannot be so limited. There is no principled way to constitutionalize intervention and limit its scope to cases such as this one. *See* Resp't Br. at 34 (explaining that "[t]he Town's view is irreconcilable with longstanding judicial practice and makes no sense as applied to the different parties that properly and routinely ask courts to act on their behalf").

"Federal Rule of Civil Procedure 24 distinguishes a permissive intervenor from an intervenor of right by the stake each has in the litigation. The intervenor of right has an interest in the litigation that it cannot fully protect without joining the litigation, while the permissive intervenor does not." *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 381 (1987) (Brennan, J., concurring). For that reason, permissive intervention merely requires that an intervenor assert "a claim or defense that shares with the main action a

common question of law or fact," Fed. R. Civ. P. 24(b)(1)(B), and thus "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation," *U.S. Realty*, 310 U.S. at 459. Indeed, this Court has recognized that permissive intervention may be appropriate even though the litigant may only possess a "public" interest and lack "any personal, financial or pecuniary interest in the property in the custody of the federal court." *Id.* at 460; *Shaw v. Hunt*, 154 F.3d 161, 165 (4th Cir. 1998) (recognizing that "a party who lacks standing can nonetheless take part in a case as a permissive intervenor"); Resp't Br. at 37-38.

The Town's argument would render permissive intervention unconstitutional in most if not all cases, effectively eliminating Rule 24's distinction between intervention as of right and permissive intervention. Any party seeking to intervene would have to possess Article III injury-in-fact—whether that party sought to intervene as of right or by permission. If a litigant seeking to intervene must possess Article III standing, it is hard to see what would be left of the broad discretion courts have under Rule 24 to permit interested litigants to intervene. Indeed, the Town's effort to constitutionalize Article III would render permissive intervention practically a dead letter. The Town effectively concedes as much, suggesting that district court judges would have the authority to grant permissive intervention only if accompanied by severe restrictions that would prohibit the intervening party from taking any action to "independently invoke the court's authority in any way." Pet'r Br. at 49. In other words, groups that under Rule 24(b) would have the authority to intervene by permission of the court would effectively be reduced to the status of *amicus curiae*.

Finally, requiring every intervenor to possess Article III standing would introduce particular complications in cases in which litigants seek to intervene on behalf of a defendant. District courts do not currently assess whether a defendant—who has not suffered any injury, but has allegedly caused injury—has standing. *See* Resp't Br. at 35 ("Courts do not ask whether *defendants* have Article III standing."). The Town's view of Article III would require district courts to create a new body of law to decide the standing of those litigants that seek to intervene on the defendant's side. While courts could model this new law of standing on the body of existing law that concerns a defendant's standing to appeal, the considerations are not necessarily the same and, in any event, courts would be thrust into the position of deciding the meaning of Article III in a host of cases in which they do not currently do so. This illustrates the basic disjuncture between Article III, which requires a case or controversy, and intervention, which concerns whether additional litigants may join an existing case properly within the jurisdiction of the federal courts. That disjuncture makes clear why the Town's arguments are wrong and would effect a radical change in the law of intervention. They should not be accepted.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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RECORD AND BRIEFS

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No. 16-605

In the Supreme Court of the United States

TOWN OF CHESTER, NEW YORK,
Petitioner,

v.

LAROE ESTATES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL LEAGUE OF CITIES, THE U.S. CONFERENCE OF MAYORS, AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICUS CURIAE*[1]

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in USCM by its chief elected official, the mayor.

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[1] Pursuant to Rule 37.6 *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

The parties' consents to the filing of this brief have been filed with the Clerk's office in conjunction with the certificate of service.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts

SUMMARY OF THE ARGUMENT

The Second Circuit's ruling allowing Laroe Estates, Inc. to intervene under Rule 24 without first showing Article III standing sets a dangerous precedent that allows parties without a direct and concrete stake in the outcome of a case to prolong and complicate litigation, resulting in increased costs of litigation. The consequences are even more serious in cases involving state and local governments, as the cost of intervention also comes at the expense of taxpayers, complicating litigation (as well as settlement), and forcing government entities to continue to litigate in order to avoid allowing third-parties to control the results of the litigation, which can have significant public policy consequences. *Amicus* urges the Court to reverse the Second Circuit's decision and hold that Article III standing is required for intervenors.

ARGUMENT

I. ALLOWING PARTIES TO INTERVENE WITHOUT ARTICLE III STANDING REMOVES A CHECK AGAINST FRIVOLOUS CLAIMS AND UNNECESSARILY COMPLICATES LITIGATION

A. Intervention Allows Parties to Participate Fully in the Litigation as a Party.

Intervenors of right can "litigate fully once admitted to a suit," which "[has] the inevitable effect of prolonging the litigation to some degree." *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1304 (9th Cir. 1997). Intervention of right allows intervenors to effectively take over litigation from the original plaintiffs and defendants in litigation. *See* Amy Gardner, *An Attempt to Intervene in the Confusion: Standing Requirements for Rule 24 Intervenors*, 69 U. CHI. L. REV. 701, 702 (2002), *see also Chiles v. Thornburgh*, 865 F.2d 1197, 1216 (11th Cir. 1989) ("The duplicative nature of the claims and interests [the intervenors] asserted threatens to unduly delay the adjudication of the rights of the parties in the lawsuit and makes it unlikely that any new light will be shed on the issues to be adjudicated.").

B. The Supreme Court Has Long Held That a Party That Wishes To Invoke The Jurisdiction Of Any Federal Court Must Have Standing To Bring A Suit as a Check on Litigation.

Courts have long held that "one component of a case or controversy is that a party who invokes federal court jurisdiction must have standing to sue." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). Further, under the American Rule, a petitioner must bear all costs associated with bringing a suit. *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682–84 (1983). The system forces litigants to make economically efficient decisions, such that a "rational plaintiff will bring suit only if the expected judgment would be at least as large as his expected legal costs, i.e. the total legal costs discounted by his probability of losing at trial." *New Jersey. v. EPA*, 663 F.3d 1279, 1288 (D.C. Cir. 2011) (Brown, J., dissenting); *see also* Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. Legal Stud. 55, 58 (1982).

Judges have found that standing is a useful safeguard in managing the "litigation explosion" caused by the 1966 amendments to the Federal Rules of Civil Procedure. The amendments relaxed party joinder requirements. *See* Carl Tobias, *Standing to Intervene*, 1991 Wis. L. Rev. 415, 439 (1991). As a check against the relaxed joinder rules, Article III standing limits federal jurisdiction to cases where parties have a personal stake in the outcome. *See* Matthew Light, *Standing of Intervenor-*

Defendants in Public Law Litigation, Fordham L. Rev. 1539, 1584 (2012).

C. Generally, Requiring Intervenors to Demonstrate Standing Aligns the Intervenors' Economic Interests With Those of the Other Parties to the Suit.

"[I]ntervenors bear far fewer costs, and thus shoulder far less risk, than petitioners," meaning that "a party with a marginal claim would be substantially more likely to intervene than it would be to file suit in its own right." *New Jersey*, 663 F.3d at 1288. Because intervenors do not internalize the full costs of bringing a suit, it encourages them "to pile on claims that are not sufficiently meritorious to justify filing in their own right." *See* Richard L. Revesz and Michael A. Livermore, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health*, Oxford University Press (2008) ("[W]e need a mechanism that tells us when to stop spending money. Cost-benefit analysis is that mechanism."). A lack of internalization for intervenors creates an incentive structure at odds with the original parties to suit and a threat to economic efficiency.

Litigation is often a lengthy and expensive process.[2] Intervenors cause the marginal burden (which

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[2] These costs are not always monetary. For example, in *Keith v. Daley*, 764 F.2d 1265 (7th Cir. 1985), a pro-life organization sought to intervene in a suit brought by a group of physicians who challenged the constitutionality of a law that prevented

litigants already do not pay) to increase with each suit presented in the court system. Courts must listen to additional witnesses, arguments, and demand requests which extend litigation over a much longer time frame. *See* Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 Wash. U. L. Q. 215 (2000), http://openscholarship.wustl.edu/law_lawreview/vol78/iss1/4. Some have suggested that the flexibility which encourages parties to intervene facilitates economic efficiency because it allows a single case to incorporate multiple claims, precluding "duplicative suits" and "inconsistent and conflicting decrees." Cindy Vreeland, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. CHI. L. Rev. 279, 302 (1990). However, their logic does not hold when the parties seeking to intervene do not have standing to bring an independent suit. Those parties' interests are at best duplicative, and at worst in outright conflict with the interests of the original party.

The burden of an intervenor's cost on litigation cannot be easily quantified in terms of money, nor time spent on a case. However, coordination costs rise for the original parties and for the court because when intervenors enter litigation, new hearings must be scheduled, and a new timeline for pleadings

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them from performing abortions. While intervention was denied for reasons not implicating Article III standing, a delay in the resolution of the case would surely have imposed costs well beyond attorney's fees.

must be set. When deciding to pursue litigation in the first place, the original litigants may not have anticipated an intervention, so their cost-benefit calculus is distorted post-hoc as they endure delays in the resolution of their case while courts consider new issues raised by intervenors. *See* Vreeland, 57 U. CHI. L. REV. 279 at 299 ("Intervention threatens control because intervenors will usually introduce new evidence, new issues, and new positions on existing issues...New parties always bring with them new costs, and intervention may so strain resources that the original parties cannot afford to maintain the suit.").

Without sufficient standing requirements, court systems that already have serious budget constraints may become further backlogged. *See* Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 673 (1973) (noting the opportunity costs of litigation provide the court system with a functional "initial screening barrier"). The requirement that intervenors have Article III standing will ensure that courts operate efficiently and are free of the intervention of unnecessary parties who bring little to the table.

D. Requiring Intervenors to Demonstrate Standing Also Ensures the Courts Are Not Employed to Decide Ideological Issues.

Standing is designed to limit the judiciary's jurisdiction to actual cases and controversies, whereas public policy should be the domain of democratically elected representatives. For instance, in *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2015),

Judge Gorsuch wondered,

> What would happen, for example, if the political majorities who run the legislative and executive branches could decide cases and controversies over past facts?... [C]onversely, what would happen if politically unresponsive and life-tenured judges were permitted to decide policy questions for the future or try to execute those policies? The very idea of self-government would soon be at risk of withering to the point of pointlessness.

The judiciary cannot address all areas of public concern, and it would be misguided to allow private citizens to use the courts towards that end. *See Raines v. Byrd*, 521 U.S. 811, 819 (1997), *citing Muskrat v. United States*, 219 U. S. 346, 356 (1911) ("[F]rom its earliest history this [C]ourt has consistently declined to exercise any powers other than those which are strictly judicial in their nature."). The Court has denied standing based on insufficient interests regarding a number of generalized grievances, from environmentalists, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-76 (1992), to taxpayers, *Massachusetts v. Melon*, 262 U.S. 447, 488-89 (1923), to anti-war activists, *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208, 217-220 (1974).

Granting standing to parties with only generalized grievances forces courts to serve as moderators "for the vindication of...value interests." *United States v. SCRAP*, 412 U.S. 669, 687 (1973). Self-styled public-interest intervenors who frequently bring actions against government entities and municipalities often lack Article III standing

because their interests are "relatively intangible, abstract, [and] ideological," as compared to the concrete interests of the petitioner who initiated the suit. *See Tobias* at 419; *see also e.g., Lujan*, 504 U.S. 555. Many of the intervenors who effectively lack standing are involved in cases for ideological reasons. Barring those intervenors without standing helps prevent "the conversion of [federal] courts...into judicial versions of college debating forums." *Mausolf v. Babbitt*, 913 F. Supp. 1334, 1344 (1996). Allowing only parties with standing to intervene allows courts to avoid becoming involved in political debates.

II. FAILING TO REQUIRE STANDING OF INTERVENORS POSES A PARTICULAR PROBLEM FOR STATE AND LOCAL GOVERNMENTS AND THEIR TAXPAYERS.

When acting as parties to litigation, state and local government entities suffer the same problems as other litigants when litigation is unnecessarily complicated by intervenors. However, the burden intervenors impose is more magnified in a setting where state or local government entities are parties.

A. When Intervenors Complicate Litigation Involving Government Entities, the Increased Cost of the Litigation Falls on the Taxpayer.

When an intervenor enters a suit where a government entity is already a party, the increased litigation costs for the government fall on the taxpayers. As noted above, intervenors raise costs, creating issues of particular concern for government

litigants. The number and complexity of cases involving state and local governments has risen in the past four decades, largely in part to the 1966 amendments to the joinder rules, which gave rise to what became known as "public law litigation." *See* Appel, 78 Wash. U. L. Q. 215 at 215. Abram Chayes described public law litigation as involving a "grievance about the operation of public policy"—most often governmental policy. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1302 (1976).

The new rules that facilitated intervention, coupled with the large pool of potential parties to draw on, have increased the size and frequency of lawsuits that state and local governments are forced to defend against. *See* Vreeland, 57 U. Chi. L. Rev. 279 at 280. These suits are particularly expensive to litigate as they "involve sprawling party structures, an emphasis on legislative fact-finding, prospective relief, ongoing decrees that affect widespread interests, and active involvement by judges." *Id.* at 280. Reduced barriers to entry in public-interest cases attract ideologically driven intervenors who will raise costs for the original litigants not only by "making the litigation more cumbersome, but also (and more important) by blocking settlement." *Solid Waste Agency v. United States Army Corps of Eng'rs*, 101 F.3d 503, 507 (7th Cir. 1996). The inability for a government entity to settle a case also adds unnecessary burden on taxpayers because the suit is prolonged.

Further, the risk of prolonged and convoluted

litigation weighs more heavily on smaller governments relative to larger cities.[3] For example, New York City reduced its overall litigation costs after it began a cost-mitigation policy that encouraged settlement. *See* Mike Maciag, *From Police Shootings to Playground Injuries, Lawsuits Drain Cities' Budgets, Governing the States and Localities* (November 2016), http://www.governing.com/ topics/finance/government-lawsuits-settlements.html. Smaller municipalities such as the petitioner in this case cannot utilize similar strategies that require larger economies of scale.

B. Intervenors in Suits Involving Government Entities May Be More Likely to Have an Ideological Interest, Resulting in a Greater Risk of Litigation Over Generalized Grievances.

Standing requirements purposely prevent parties with only generalized grievances from bringing suit. Failure to impose standing requirements on intervenors increases the risk that intervenors will introduce generalized grievances to a suit. When a government entity is a party to litigation, it is more

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[3] Most municipalities are relatively small. In 2015, 84% of cities, towns and villages in the United States (16,470 of 19,505) had populations of less than 10,000 people. Statista.com, Number of cities, towns and villages (incorporated places) in the United States in 2015, by population size, https://www.statista.com/statistics/ 241695/number-of-us-cities-towns-villages-by-population-size/.

likely that a third party will seek intervention because of ideological concerns about government regulations or statutes, rather than because of more concrete and particularized interests in the subject matter of a suit.

Because government entities craft and execute public policy, they face the brunt of the costs and the consequences of increased access to litigation regarding policy matters. Government entities have few precious resources to dedicate to litigation resolution. If standing requirements are relaxed to allow disinterested parties to intervene in such cases, this would remove autonomy from governments and force them to address legal battles they would otherwise find it prudent to avoid.

The issue is particularly salient in cases with public policy controversies involving governmental bodies. Two parties may simply want their controversy resolved, but must worry about "their case being taken over by intervenors who present themselves as concerned citizens or public interest organization." Gardner, 69 U. CHI. L. REV. at 702; *see, e.g.*, *Sagebrush Rebellion, Inc. v Watt*, 713 F.2d 525 (9th Cir. 1982) (where a wildlife group intervened to protect bird habitats).

Requiring Article III standing of intervenors does not prevent these groups from having their views heard. Rather, they have another avenue that they could consider instead of burdening litigation as intervenors: acting as *amici*. Most courts place few limitations on who can file an amicus brief or what

the brief must say. *Amici* can impact litigation without having the same expansive rights as intervenors. *See* Appel, 78 WASH. U. L. Q. 215 at 307-309. Like intervenors, *amici* can make their arguments known to a court through briefs without adding to the cost of litigation. Research indicates that well-written amicus briefs from prominent attorneys in particular can be very influential. Kelly J. Lynch, *Best Friends?: Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J. L. & POLITICS 33, 52-56 (2004). Parties whose interest is merely to impact policy should not be permitted to intervene in the litigation because they can express their views to the court as *amici*.

As noted above, municipalities are more likely to be the victims of intervenors with an ideological bent, who lack Article III standing. Consider the example of the polarizing litigation a number of municipalities, including San Francisco, have brought against President Trump relating to the Executive Order entitled, "Enhancing Public Safety in the Interior of the United States." Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) or the so-called "sanctuary city" litigation. In these cases, municipalities have brought suit against President Trump claiming that the aforementioned executive order violates the Constitution in a number of ways, specifically with regard to the Fifth and Tenth Amendments.

This is a politically charged issue, with people on both sides of the issue holding unshakable beliefs that their side is correct. It is not a stretch therefore

to imagine that if Article III standing was not required for intervenors, (which is currently not a requirement in the Ninth Circuit), residents of San Francisco would be lining up to intervene in the suit. Some might argue that the city was wrong not to comply with the executive order because they will lose a huge portion of their city's budget if federal funding is withdrawn, thereby depriving residents of needed services. Others may want to intervene arguing the city should cooperate fully with the federal government in immigration enforcement because they have been the victim of a crime committed by an undocumented person. On the other side, intervenors may argue that President Trump's executive order will cause an increase in crimes going unreported and erosion of trust between communities and local law enforcement. Indeed, someone might seek to intervene because of increased violence in their neighborhood due to the community's fear in reporting crime to the police. Someone else might intervene to argue that the executive order prevented her daughter from going to the police when her spouse was abusing her, which resulted in her death.

In either case, a federal judge who is already dealing with expedited briefing and perhaps expedited discovery under a national microscope would have to allow additional hearings and discovery for these added intervenors, which would waste time and resources for both the court and parties. These intervenors would likely be seeking information via written discovery request and potentially time consuming and costly depositions

that do not go to the heart of the case, for example, information on how the city spends its funds, what programs it plans to cut if it loses funding, discovery on police reports, crime statistics, etc. It is not hard to imagine how the litigation could quickly spiral out of control.

Now consider if the exact same litigation had been brought by the City of Chicago against President Trump in the Seventh Circuit. None of these intervenors would be allowed in to the suit unless they could demonstrate independent Article III standing, which in this hypothetical is unlikely. Instead, as noted above, they would have the ability to file amicus briefs to help persuade the court to decide the case in their favor. This result balances judicial economy while still allowing these outside parties to influence the court.

C. Intervention Forces Government Entities to Litigate Positions Beyond the Point Where the State Would Choose to Avoid Further Expenditure of Government Funds, In Order to Avoid Allowing an Intervening Third Party to Control the Result.

The government entity represents the entirety of its citizens, while a single intervenor undertakes the costs of litigation to further its own particularized preferences. When it comes to intervenors of right, state and local governments are faced with a Hobson's choice—either fully litigate the issue themselves, or risk allowing a party to intervene as of right based on inadequacy of representation,

which would then allow that party to shape litigation. Either way, the issue ends up being litigated to its furthest extent, perhaps against the wishes of the government, the public at large, and the taxpayers.

Private citizens and governmental entities have necessarily different motivations. The ability of intervenors of right to intervene depends on their individualized interest in the outcome. However, state and local government actors ostensibly engage in litigation to protect the public interest. While the private interests of intervenors and public interests of state and local government may line up at least occasionally, they do not line up all of the time. Given that governments, by their formation, hold a monopoly on recognized political power within their respective jurisdictions, it is more philosophically consistent not to allow private actors to effectively act as state and local government actors in litigation.

In *Diamond v. Charles*, 476 U.S. 54 (1986), the constitutionality of an Illinois statute concerning abortion was challenged, and Diamond sought to intervene as a defendant. When the trial court issued a preliminary injunction against the law, Diamond was the sole appellant as an intervenor. This Court held that for an intervenor to be the sole appellant from a judgment, the intervenor must "fulfill the requirements of Article III." *Id.* at 68.

By not appealing, the state indicated its acceptance of that decision and its lack of interest in defending its own statute. There are a number of

reasons why this would be perfectly acceptable behavior: a number of states prior to *Obergefell* declined to appeal decisions against their gay marriage bans, for instance. When a state or local government makes such a public policy decision, intervenors should not be permitted to override that decision and force the litigation to continue unless they can demonstrate Article III standing.

The case at bar illustrates how intervenors with such tenuous interests may needlessly prolong a case at the expense of a local government. The controversy in question began when Laroe Estates, Inc. entered a purchase agreement with the now-deceased original plaintiff, Steven Sherman. *Laroe Estates, Inc. v. Town of Chester*, 828 F.3d 60, 63 (2d Cir. 2016). The parties signed the agreement in 2003, when many homeowners purchased homes at prices above post-Recession values. *Id.* Now over a decade later, the circumstances have changed significantly, yet resolution for the original parties is nowhere in sight. The current plaintiff (Sherman's widow) has asserted that she lacks an "incentive to move the case forward" and is "unwilling to pursue the claim" herself. *Laroe*, 828 F.3d at 67. However, by allowing Laroe to intervene, the court further prolonged a case that has already lasted for eight years since the date of filing, and sixteen years since the original plaintiff applied for subdivision approval. *Id.* (emphasis added).

The circumstances today are nothing like those the parties anticipated when litigation began. The Town of Chester continues to bear the cost of a

lawsuit that the original plaintiff no longer wishes to pursue, and for which the intervenor has no cognizable interest. In the interest of efficiency, such situations should be prevented by requiring intervenors to demonstrate Article III standing.

D. Allowing Parties to Intervene Without Article III Standing Leads To Prolonged Litigation Because Settlement Becomes More Difficult.

Judges have utilized standing requirements as "an efficacious basis for excluding intervention applicants that would expand the number of litigants in a lawsuit" amid "increasingly unwieldy party structure of cases." *See* Tobias, 1991 WIS. L. REV. 415 at 440. Settlement negotiations have been harmed by the introduction of third parties to litigation. As the Seventh Circuit has observed:

> [W]hen the extra litigant may block settlement or receive an award of attorneys' fees, it is not simply along for the ride. An intervenor is not an *amicus curiae,* even a "litigating" *amicus curiae* (one that introduces evidence at trial). The intervenor seeks control of the suit, acquires a right to conduct the case in a way that may undermine the interests of the original plaintiff...and may become eligible for a separate grant of relief or an award of attorneys' fees. *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 531 (7th Cir. 1988).

An example of the settlement issue in litigation comes *Altitude Nines, LLC v. Deep Nines, Inc.*, Index

No. 603268-2008E (N.Y. Sup. Ct. 2008). Deep Nines used a third-party litigation financier to pay for commercial litigation prior to *Altitude Nines, LLC v. Deep Nines*. Deep Nines settled that initial case for $25 million dollars, but after paying the financier, their attorney costs, and court costs, they were only able to keep $800,000 – just three percent of the initial settlement.[4]

The Seventh Circuit addressed the settlement issue in *Solid Waste Agency v. United States Army Corp of Eng'rs*. The Court held that "A party cannot be forced to settle a case. An intervenor acquires the rights of a party. He can continue the litigation even if the party on whose side he intervened is eager to settle." *Id.* at 509, *citing United States v. City of Chicago*, 897 F.2d 243, 244 (7th Cir. 1990); *Bethune Plaza, Inc. v. Lumpkin*, *supra*, 863 F.2d at 531, *United States v. Yonkers Board of Education*, 801 F.2d 593, 596 (2d Cir. 1986). The effect that these intervenors have on litigation is massive – and creates an especially large burden when the taxpayers must foot the bill. When government entities are original parties to a suit, they must be able to settle that suit when necessary in order to prevent wasteful spending that burdens the taxpayers. Intervenors drastically undermine the ability of government

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[4] *Stopping The Sale On Lawsuits: A Proposal To Regulate Third Party Investments In Litigation*, U.S. Chamber Institute For Legal Reform, October 2012, http://www.instituteforlegalreform.com/ uploads/sites/1/TPLF_Solutions.pdf

entities to settle suits.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit Court of Appeals should be reversed.

Respectfully submitted,

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RECORD AND BRIEFS

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No. 16-605

In The
Supreme Court of the United States

TOWN OF CHESTER, NEW YORK,

Petitioners,

v.

LAROE ESTATES, INC.,

Respondent.

On Writ of Certiorari To
The United States Court Of Appeals
For the Second Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether intervenors participating in a lawsuit as of right under Federal Rule of Civil Procedure 24(a) must have Article III standing, or whether Article III is satisfied so long as there is a valid case or controversy between the named parties.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, *Amicus* National Association of Home Builders (NAHB) states that it is a non-profit 501(c)(6) corporation incorporated in the State of Nevada, with its principal place of business in Washington, D.C. NAHB has no corporate parents, subsidiaries or affiliates, and no publicly traded stock. No publicly traded company has a ten percent or greater ownership interest in NAHB.

Amicus National Federation of Business Small Business Legal Center (NFIB Legal Center) is a 501(c)(3) public interest law firm affiliated with the National Federation of Independent Business (NFIB), a 501(c)(6) business association, which supports the NFIB Legal Center through grants and exercises common control of the NFIB Legal Center through officers and directors. No publicly-held company has a ten percent or greater ownership of the NFIB Legal Center.

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INTEREST OF *AMICI CURIAE*[1]

NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. NAHB has member companies in all 50 states, the District of Columbia, and Puerto Rico, and over 700 affiliated local and state associations throughout the Nation. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and constitute 80% of all homes constructed in the United States.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the constitutional and statutory rights and business interests of its members and those similarly situated. NAHB frequently seeks to intervene in cases where its members' interests are implicated, and where its perspective will not otherwise be represented. For example, NAHB has sought to intervene on behalf of the federal government in cases where environmental groups challenge regulations that govern NAHB's members.

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1 Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses. As a frequent participant in the federal courts, the NFIB Legal Center is concerned that its ability to participate in the future would be hindered if the Petitioner's position is adopted.

Imposing standing requirements onto parties like *Amici* when they seek to intervene impermissibly burdens their ability to give their members a voice in litigation concerning the regulations with which they must comply.

SUMMARY OF ARGUMENT

Intervention into an existing case or controversy provides an efficient means for parties to have their related concerns adjudicated in one proceeding, creating additional efficiency for courts as well. *See* 7C Charles Alan Wright, et al., *Federal Practice and Procedure* §1901 (3d. ed. 2017)(recognizing the "public interest in the efficient resolution of controversies"). Rule 24 of the Federal Rules of Civil Procedure appropriately governs the interests of those who seek to intervene.[2]

Some courts have added a standing inquiry to this equation, which is wholly unnecessary. As Respondent Laroe Estates' brief concisely states, "Rule 24 already ensures that only appropriate intervenors participate in litigation, and courts have ample case-management tools to ensure that intervention does not improperly burden other parties." Brief for Resp't at 2, *Town of Chester v. Laroe Estates, Inc.*, No. 16-605 (March 27, 2017).

The errors of requiring standing for all would-be intervenors are crystallized in an examination of instances where standing is required of those seeking to intervene on behalf of *defendants*. An

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[2] Rule 24 of the Federal Rules of Civil Procedure governs intervention as of right (Rule 24(a)) and permissive intervention (Rule 24(b)). Intervention as of right is required where a party "is given an unconditional right to intervene by a federal statute" or "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a).

opinion from the D.C. Circuit – one of the few jurisdictions that requires standing for intervenors – laid out some of the conflicts between a standing requirement for intervenors supporting defendants (so-called "intervenor-defendants") and well-established precedent governing access to the federal courts. In *Roeder v. Islamic Republic of Iran,* the court recognized that requiring intervenors to demonstrate standing runs counter to the doctrines that the "standing inquiry is directed at those who invoke the court's jurisdiction" and "that Article III is satisfied so long as one party has standing." 333 F.3d 228, 233 (D.C. Cir. 2003). This brief will discuss these conflicts more fully below, and address as well the principle that standing is an obligation for courts, not individual parties. Finally, this brief will highlight the broader policy ramifications of the current circuit split and the need for a clear national directive.

Amici stand firmly with Respondent Laroe Estates in opposing the Petitioner's ill-conceived stance requiring all intervenors to demonstrate Article III standing. *Amici* urge this Court to affirm the U.S. Court of Appeals for the Second Circuit's holding that intervenors need not show standing.

ARGUMENT

I. STANDING IS NOT AN ELEMENT OF INTERVENTION.

A. Standing is Required for Those Invoking the Court's Jurisdiction

Courts have long placed the onus on the plaintiff or petitioner to demonstrate that she has standing to bring a case. In *Lujan v. Defenders of Wildlife,* this Court held that the "party *invoking* federal jurisdiction bears the burden of establishing" the elements of standing. 504 U.S. 555, 561 (1992)(emphasis added). As this Court stated in *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, this requirement arises out of the U.S. Constitution's Article III. 454 U.S. 464, 472 (1982)("Article III requires the party who *invokes* the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant'. . .") (internal citations omitted)(emphasis added). *See also Virginia v. Hicks*, 539 U.S. 113, 120 (2003)(holding that because the party invoking "the authority of the federal courts" had standing, the case could be heard). More recently, in *Wittman v. Personhuballah,* this Court held that Article III "requires a party *invoking* a federal court's jurisdiction to demonstrate standing." 136 S.Ct. 1732, 1736 (2016)(emphasis added).

The circuit courts as well have held fast to this principle. *See, e.g., Carbon Sequestration Council v. EPA*, 787 F.3d 1129, 1132-1133 (D.C. Cir. 2015)("As the parties invoking federal jurisdiction, Petitioners

'bear [ ] the burden of establishing' Article III standing.")(internal citations omitted); *City of Clarkson Valley v. Mineta*, 495 F.3d 567, 569 (8th Cir. 2007)(holding that the party invoking federal jurisdiction must demonstrate standing); *Bischoff v. Osceola Cnty., Fla.*, 222 F.3d 874, 877-878 (11th Cir. 2000)(holding that the party invoking the court's jurisdiction must demonstrate standing); *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998)("Traditionally, standing was required only of parties seeking to initiate a lawsuit.").

Nowhere have courts held that a defendant – a person decidedly not invoking the jurisdiction of the court – must demonstrate standing. At the expense of stating the painfully obvious, if defendants were required to demonstrate standing, the vast majority would simply decline to make such a showing and thereby escape judicial review.

Yet, some circuit courts have held that for parties to intervene on behalf of defendants, these parties must demonstrate standing. Would-be intervenor-defendants are not "invoking federal jurisdiction" – instead, they seek to protect interests that are implicated by the case-in-chief. *See, e.g., Fund for Animals, Inc. v. Norton*, 322 F.3d 728 (D.C. Cir. 2003)(permitting the intervention of a country's natural resources agency on behalf of defendant Secretary of the Interior because if environmental plaintiffs were successful in their suit, the country would be injured through resulting revenue decline for its conservation program).

The D.C. Circuit in *Roeder* recognized the inherent conflict in requiring intervenor-defendants

to demonstrate standing: "Requiring standing of someone who seeks to intervene as a defendant. . . runs into the doctrine that the standing inquiry is directed at those who invoke the court's jurisdiction." 333 F.3d 228, 233 (D.C. Cir. 2003). This Court should reiterate here its long-held position that standing is required only of those invoking the court's jurisdiction.

B. Standing is Satisfied by One Party

Another familiar refrain of the standing doctrine is that only one party must demonstrate standing in order for a case to move forward. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)(recognizing that the court of appeals did not determine whether other plaintiffs had standing because the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986)(finding that, although multiple entities challenged the act in question, because one party has standing, that was sufficient to allow the court to reach the merits); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 n.9 (1977)(holding that because one party had standing, the case could proceed). Recently, the Supreme Court in *Massachusetts v. EPA*, held that "[o]nly one of the petitioners needs to have standing to permit us to consider the petition for review." 549 U.S. 497, 518 (2007). The circuit courts as well have echoed this refrain: *Montana Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 981 (9th Cir. 2013)("[T]he presence in a suit of even one party with standing suffices to make a claim justiciable")(internal citations omitted); *World Trade Ctr. Families for*

Proper Burial, Inc. v. City of New York, 359 F. App'x. 177, 179-180 (2d Cir. 2009)(citing *Rumsfeld* and holding that "other plaintiffs' standing is not a threshold constitutional question" where another plaintiff has demonstrated standing); *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014)("[T]he Supreme Court has made it clear that" only one party must have standing for a case to proceed).

Requiring would-be intervenors to independently demonstrate standing imposes greater burdens on those parties than if they had been original parties in multiparty litigation. Instead, so long as one party has standing to bring the suit, all parties satisfying Rule 24 should be permitted to intervene.

C. Standing is an Obligation for the Courts, Not the Parties

Legal scholars have written extensively on the question of whether intervenors should be required to demonstrate standing. *See, e.g.*, Carl Tobias, *Standing to Intervene*, 1991 Wis. L. Rev. 415 (1991)(examining the imposition of standing requirements onto intervenors in various circuits). One author has framed the conflict between the circuits as arising from differing perspectives on standing and on the question of whether courts believe Article III governs courts or parties. *See* Tyler R. Stradling & Doyle S. Byers, *Intervening in the Case (or Controversy): Article III Standing, Rule 24 Intervention, and the Conflict in the Federal Courts*, 2003 BYU L. Rev. 419 (2003)(positing that the divergence in circuit opinions on standing and intervention stems from whether courts view

standing as an obligation for the courts, or for the parties).

1. It is the Courts' Responsibility to Ensure the Presence of a Case or Controversy.

Courts must abide by Article III; specifically, federal courts must ensure that the disputes before them are legitimate cases or controversies as defined by Article III. As this Court held in *FW/PBS, Inc. v. City of Dallas*, "The federal courts are under an independent obligation to examine their own jurisdiction." 493 U.S. 215, 231 (1990). *See also, e.g., U.S. v. Hays*, 515 U.S. 737, 742 (1995)(holding that the "question of standing is not subject to waiver" and citing *FW/PBS* admonition that federal courts have an "independent obligation to examine their own jurisdiction."); *DaimlerChrysler v. Cuno*, 547 U.S. 332, 340 (2006)("We have 'an obligation to assure ourselves' of litigants' standing under Article III.")(internal citations omitted). As such, courts are obligated to ensure that standing is satisfied, regardless of whether it is raised by the parties or considered by the courts below. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997)(holding that federal appellate courts have a "special obligation" to ensure their jurisdiction as well as that of the courts below, "even though the parties are prepared to concede it.")(internal citations omitted). Thus, the Constitution and subsequent judicial interpretation require the courts, not the parties, to ensure the existence of a justiciable controversy. The court in *Habitat Educ. Ctr., Inc. v. Bosworth,* emphasized that "Article III represents a limitation on the power of the federal

courts – not a requirement of all who seek to come before them." 221 F.R.D. 488, 493 (E.D. Wis. 2004). As the Fifth Circuit said in *Ruiz*, "These cases recognize that the Article III standing doctrine serves primarily to guarantee the existence of a 'case' or 'controversy' appropriate for judicial determination...and hold that Article III does not require each and every party in a case to have such standing." 161 F.3d at 832.

2. This Responsibility Arises From the Separation of Powers Doctrine.

Courts have interpreted the case-or-controversy requirement as born from the separation of powers doctrine. "[T]he law of Art. III standing is built on a single basic idea – the idea of separation of powers." *Allen v. Wright*, 468 U.S. 737, 752 (1984) *abrogated on other grounds by Lexmark Int'l. Inc. v. Static Control Components*, 134 S.Ct. 1377 (2014). By ensuring the existence of a live controversy, the risk of offering an advisory opinion – a quasi-legislative function – is substantially diminished. *See Flast v. Cohen*, 392 U.S. 83, 96 (1968)(recognizing that "implicit policies embodied in Article III . . . impose the rule against advisory opinions on federal courts."). If one plaintiff has standing, then a live, valid Article III controversy exists and the court may adjudicate it. The Fifth Circuit in *Ruiz* likewise recognized that the injury component of standing "ensures that courts will decide only actual disputes and not abstract policy questions more properly decided by coordinate branches of government." 161 F.3d at 829.

Because the ultimate responsibility for ensuring that the case-or-controversy requirement is satisfied rests with the federal courts, the court can assure itself of its jurisdiction to hear a dispute when one plaintiff demonstrates standing. While it is the plaintiff who must make the demonstration, the sole purpose of that exercise is to assist the court in determining that the presence of a properly limited case-or-controversy is present, thereby satisfying the court's separation of powers obligation imposed through Article III.

II. CIRCUITS IN THE MINORITY ILLUSTRATE THE NEED FOR A NATIONAL RULE.

A. Geographic Disparities Undermine Access to Justice

Many courts, including this Court, have noted the long-standing split among the Circuit Courts on the question of whether intervenors must demonstrate standing. *See Diamond v. Charles*, 476 U.S. 54, 69 n.21 (1986)(observing that the "Courts of Appeals have reached varying conclusions as to whether a party seeking to intervene as of right must himself possess standing."); *Ruiz*, 161 F.3d at 831-832 (describing the state of the circuit split and reviewing recently decided cases in the circuits); *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 538 (D.C. Cir. 1999)(recognizing the split among the various circuits). The end result of the disparity is that a person may not be able to protect her legitimate interests solely because of her geographic location. *See* Amy M. Gardner, *An Attempt to Intervene in the Confusion: Standing Requirements*

for Rule 24 Intervenors, 69 U. Chi. L. Rev. 681 (2002)("[O]ne's right to intervene is dependent not upon the Federal Rules of Civil Procedure or the Constitution, but instead upon the circuit in which the suit is brought.") *Id. at* 697.

Moreover, Congress has assigned the D.C. Circuit sole authority to consider a number of statutory challenges. *See* Eric M. Fraser, et al., *The Jurisdiction of the D.C. Circuit*, 23 Cornell J.L. & Pub. Pol'y 131, 133 (2013)(examining the various statutes in which Congress designated the D.C. Circuit to adjudicate claims on certain statutes that involved national subjects or had national effects.). For example, Congress requires nearly all litigation concerning the Clean Air Act to be heard only by the D.C. Circuit. 42 U.S.C. §7607(b).

Amici urge this Court to take this opportunity provide a comprehensive answer to this split and hold that intervenors on behalf of both plaintiffs and defendants need not demonstrate standing where the plaintiff has already established the presence of a case or controversy.

B. The D.C. Circuit's Minority-Held View Has an Out-sized Impact on Access to the Courts

In 1950, President Truman said of the D.C. Circuit, "[N]owhere else, outside the Supreme Court of the United States, will so many legal questions of national magnitude be decided as in this building here before us." Adam J. White, *The Regulatory Court*, The Weekly Standard, (Aug. 26, 2013), *http://www.weeklystandard.com/the-regulatory-*

court/article/748494 (last visited March 28, 2017). President Truman's words remain true today, nearly 70 years later. The D.C. Circuit hears more cases challenging federal administrative issues than any other circuit court. *See The Jurisdiction of the D.C. Circuit* at 132 ("It is old news that the D.C. Circuit hears proportionately more cases involving administrative law than do the other circuits."). *Amici* frequently challenge regulatory actions on behalf of their members, and are not alone in this endeavor. Federal regulations impact millions of Americans in all areas of their lives, from running businesses to building homes. The D.C. Circuit's sphere of influence therefore is nationwide.

Yet, the D.C. Circuit, which has such breadth and depth of influence, has chosen to require would-be intervenors (both plaintiff and defendant) to demonstrate standing, albeit not without raising some concerns. *See, e.g., Roeder*, 333 F.3d at 233. While the D.C. Circuit has been joined by only two other circuits, the impact of this minority viewpoint is enormous.

The D.C. Circuit's position has prevented regulated industries from participating in litigation on the very rules with which they must comply. *See Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317 (D.C. Cir. 2013)(preventing utilities from intervening in a lawsuit between an environmental group and EPA regarding the promulgation of Clean Water Act regulations with which the utilities must comply). A group of creditors were barred from litigation that threatened their ability to recover lost funds resulting from a bank closure. *See Deutsche Bank Nat'l Trust Co. v. F.D.I.C.*, 717 F.3d 189 (D.C.

Cir. 2013)(holding that senior note holders failed to demonstrate standing in litigation brought against the receiver of the defunct bank in which the note holders invested and another party). And a group representing hunters was prevented from intervening in settlement discussions between environmental groups and the U.S. Fish and Wildlife Service that led to the listing of hundreds of species. *In re Endangered Species Act Section 4 Deadline Litigation-MDL No. 2165*, 704 F.3d 972 (D.C. Cir. 2013)(barring hunting group from intervening in environmental groups' litigation seeking listing decisions on hundreds of species). The mass species listing that resulted from this settlement impacted more than hunting groups. *See National Ass'n of Home Builders, et al. v. U.S. Fish and Wildlife Serv.*, 786 F.3d 1050 (D.C. Cir. 2015)(prohibiting four trade associations from challenging settlement agreements requiring consideration of 251 species).

The holdings in these cases impact millions of individuals nationwide. Two of the cases listed above involved settlement agreements hastily reached between plaintiff groups and federal agencies in such a way that parties directly regulated by the settlement agreements were denied a say in the outcome of the cases.

The high cost of litigation also militates in favor of allowing parties that satisfy Rule 24 to intervene. In many cases, regulated parties – especially small entities – lack the funds to initiate separate legal actions.

While moving these cases quickly to settlement may in general serve judicial efficiency goals, that laudable goal cannot be allowed to trump legitimate access to federal courts. Allowing parties that satisfy Rule 24's requirements to intervene into existing cases creates efficiencies for the courts as well as parties.

The Second Circuit recognized the egregious conduct of the Town in its dealings with the plaintiff, the late Mr. Sherman. *See Sherman v. Town of Chester,* 752 F.3d 554, 556-557 (2d Cir. 2014)(comparing Mr. Sherman's ordeal to the novel Catch 22: "Plaintiff Steven M. Sherman must have felt a lot like Yossarian in his decade of dealing with defendant Town of Chester" *Id.* at 557). In its brief, Respondent Laroe Estates described its purchase of the development MareBrook for $2.5 million. Brief for Resp't at 3. If Respondent is denied the opportunity to intervene, its ability to recover its interest in MareBrook may be lost forever.

CONCLUSION

Courts must balance an unenviable amount of competing considerations when determining whether their jurisdiction encompasses the parties and issues before them. However, judicial efficiency cannot be bought at the price of denying lawful access to the courts. Article III does not compel a finding that intervenors – plaintiff or defendant – must satisfy Article III standing. Instead, Article III requires courts to ensure that at least one party has demonstrated standing and thereby assured the court that an actual case or controversy is before it. Rule 24 takes care of the rest, and for these and the

foregoing reasons, *Amici* urge this Court to affirm the Second Circuit's decision below.

Respectfully submitted,

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FOR ARGUMENT

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PLAINTIFF NANCY SHERMAN, EXECUTRIX, AS AMICUS CURIAE IN SUPPORT OF NEITHER PETITIONER NOR RESPONDENT, URGING REVERSAL

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INTEREST OF THE AMICUS PLAINTIFF[1]

Amicus Curiae Nancy Sherman is executrix for the Estate of her late husband, Steven Sherman, the plaintiff below. This is the Sherman Estate's lawsuit. Respondent Laroe Estates, Inc. ("Laroe") is not a party below.

Mrs. Sherman did not participate in the appeal at the Second Circuit, for valid reasons including avoiding unnecessary appellate expense where the only issue was the challenge of the Petitioner Town of Chester ("Town") to the lack of constitutional standing by Laroe. Nevertheless, Mrs. Sherman is vitally interested in the proper adjudication of the appeal, as her Sherman lawsuit will be directly affected.

PLAINTIFF SHERMAN REQUESTS PARTICIPATION AT ORAL ARGUMENT

Mrs. Sherman is the plaintiff below, yet is not party to this appeal. Her counsel never anticipated a grant of *certiorari*, yet the grant creates on opportunity for justice, or the denial of justice. This Court's decision could greatly impact Sherman's rights and interests in several respects. Therefore, although Sherman did not address the narrow standing question at the Second Circuit, she requests a voice at oral argument here regarding the jurisdictional questions raised.

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[1] The captioned parties have consented to the filing of this brief. This brief is exclusively the undersigned's product with no outside monetary contribution.

Absent Sherman's input at oral argument, the Court will be disadvantaged. It will not hear Sherman's perspective, where the Town and Laroe are both very hostile adversaries to Sherman. The appellate counsel to both the Town and Laroe are new to the case. They cannot be expected to know all relevant and very complicated facts regarding a litigation commenced by Mr. Sherman's attorney (the undersigned) in 2008. They easily could make misstatements at oral argument unintentionally misrepresenting events. The undersigned is better equipped to provide answers and corrections at oral argument. And only he can provide Sherman's perspective as the civil rights victim.

Accordingly, Sherman requests participation at oral argument, so that the Estate's views can be heard. The Court can see from this *amicus curiae* brief that Sherman's arguments are very distinct from those proffered by Petitioner and Respondent. Only Sherman offers principled harmonization of Rule 24's intervention criteria with the standing requirements of Article III.

The Court will do itself a great disservice if it refuses to permit the plaintiff Sherman participation at oral argument. Justice, due process and the public interest require Sherman's input, even if the Court grants only 5 or 10 minutes of oral argument.

SUMMARY OF ARGUMENT

The Town will argue for and Laroe against requiring standing for intervention by right under Rule 24(a)(2). The best argument, however, is the argument presented by the plaintiff Sherman in this brief. Sherman's principled approach preserves and harmonizes the liberal goals of Rule 24 with the constitutional constraints of Article III. Neither the Town nor Laroe do this.

The Town argues for denying intervention to a person or entity that clearly meets Rule 24(a)(2)'s criteria for intervention by right, if standing to sue is lacking. Thus, the Town's argument substantially diminishes Rule 24(a)(2)'s coverage. The Town ignores the Rule 24 as a tool for helping a party in need of assistance, and the desirability of *pro bono publico* or otherwise generous intervenors who might be willing to help a party, even if lacking standing of their own.

The Respondent Laroe, on the other hand, argues that standing is not necessary because Rule 24 does not require it. An intervenor by right—even one who does not possess standing sufficient to sue in her own name—will under Laroe's view have full party status, with all litigation rights and privileges, merely by meeting the Rule 24(a)(2) criteria. Laroe's view is an affront to the limitations on judicial power contained in Article III—a jurisdictional question. Laroe's view allows a party without standing to fully displace a party with standing. Laroe seeks to displace Sherman in Sherman's own lawsuit. This will necessarily create a lawsuit within a lawsuit, because Laroe's effort to hijack Sherman's lawsuit will not go

unopposed. Moreover, granting Laroe full party status will empower it to obstruct settlement, to compound discovery, to demand trial, to demand attorney's fees, and to significantly burden both the plaintiff Sherman and the defendant Town. These and other pernicious effects are persuasively described in the Town's merits brief. Essentially, Laroe's position ignores the rights of the party that it ostensibly supports.

Plaintiff Sherman's principled approach, set forth at Point II below, permits a party to intervene by right if it meets the Rule 24(a)(2) criteria, while at the same time respecting Article III's constraints on federal judicial power. Thus:

➢ Only if the proposed intervenor has

1) standing sufficient to viably sue in its own name, and

2) standing to litigate against the party on whose side intervention is sought, if the relationship is adversarial,

is the proposed intervenor entitled to receive full party status in, and to employ the judicial power of, the federal courts.

➢ If the proposed intervenor does not have standing sufficient to sue in its own name, then it is allowed to proceed only to the extent it assists or aids the party supported and does not seek to control the supported party's lawsuit. If the proposed intervenor asserts claims against the party on whose side intervention is sought, creating an adversarial relationship that will require adjudication by the federal court, then it is not a permissible intervenor, absent meeting the

requirements of diversity jurisdiction. Such intervenor has no standing to ask the federal court to adjudicate the dispute, as the federal court has no Article III power to do so.

Under the above approach, absent the proposed intervenor possessing requisite standing, the federal judicial power is employed exclusively on behalf of an existing party, with the "non-Article III Intervenor's role limited to assisting the party supported. It has a voice, but not a veto.

Sherman's principled approach will allow Laroe to aid or assist the Sherman Estate in win a recovery against the wrongdoing Town, which funds can then be distributed to Mr. Sherman's creditors and heirs. Laroe will benefit from this, if it can establish itself as a *bona fide* Estate creditor. This approach prevents Laroe from hijacking or otherwise taking control of Sherman's lawsuit, and prevents Laroe from burdening the federal courts with a "equitable title" or related State law controversy over which the district court has no Article III jurisdiction.

RELEVANT FACTS

A. Overview

Mr. Sherman began seeking to develop his 398 acres of residentially zoned land ("MareBrook") in 2000. He was obstructed by the Town in many respects. *See, Sherman v Town of Chester*, 752 F.3d 554 (2d Cir 2014).

For example, Mr. Sherman was forced to sue in 2002 to end the Town's 18 month development moratorium. He should have received subdivision

preliminary approval in 2003, but the Town changed its zoning. Then again, again, and again.

Due to the Town's obstruction, Mr. Sherman sought help from various business entities, for example TD Bank and Laroe (both of whom have filed claims against the Sherman Estate). *See*, C. below.

Mr. Sherman commenced a federal lawsuit that included a takings claim in May 2008. He litigated that action in federal court until confronted by the Town's *Williamson County*[2] ripeness defense, at which time he requested and received a "so-ordered" dismissal of the federal action on January 6, 2012, and then immediately re-commenced the lawsuit in State court.[3] The Town promptly removed the Sherman's lawsuit to U.S. District Court. The District Court dismissed the action while his counsel was away,[4] and Sherman then appealed. The Second Circuit reversed. *See, Sherman, supra*. Due to cancer, Mr. Sherman did not live to see the Second Circuit's reversal, and

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[2] *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

[3] Mr. Sherman expected tolling of the limitation period under 28 U.S.C. §1367(d), but the District Court denied this right. The Sherman Estate believes it can prevail if appeal becomes necessary, as the dismissed was "so ordered." By attempting to comply with *Williamson County*, Sherman has been deprived of almost 4 years for limitations purposes. *Cert Pet.*, 35a. Unlike Sherman, Laroe's intervenor complaint does not show that it sought State court exhaustion (it did not) and thus is fatally defective.

[4] The undersigned served as a U.S. Army JAG officer in Kandahar, Afghanistan, during most of 2012.

the restoration of his takings claim by the Second Circuit. Mr. Sherman's widow was substituted as executrix of his Estate.

B. Laroe emerges out of the woodwork

Shortly after the Second Circuit's 2014 reversal of the dismissal in *Sherman, supra,* Laroe sprung out of the woodwork. It formally moved to intervene in late July 2014. The Town opposed intervention. Plaintiff Sherman took no position, as it appeared that Laroe was intervening in order to assist the Sherman Estate.[5] Laroe's motion to intervene was denied by the District Court, based on Laroe's lack of standing. The Second Circuit reversed. *Cert. Pet.* 1a ("*Laroe v. Town*"[6]).

It now seems that Laroe's intention, if it is permitted to intervene, is to hijack Sherman's case and recover most if not all takings proceeds for itself. The Sherman Estate intended to oppose Laroe's intervention based upon Rule 24(a)(2)'s criteria, per the Second Circuit's ruling, if Laroe persisted with its adversarial approach. However, this Court's unexpected[7] grant of *certiorari* preempted Sherman's planned opposition.

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[5] Laroe was not clear about its intentions at the Second Circuit: "Although it is unclear from the record whether Laroe believes the Town is directly liable to Sherman or Laroe for the alleged taking, Laroe has acknowledged that its damages are essentially the same as Sherman's. Oral Arg. Tr. 16." *Cert. Pet.* 9a (*emphasis added*).

[6] *Laroe Estates, Inc. v. Town of Chester*, 828 F. 3d 60 (2d Cir. 2016).

[7] Plaintiff Sherman's attorney had no reason to anticipate that the Court would take this case, especially since he has tried for years to get one of his sympathetic civil

C. Laroe has no rights superior to any other Sherman Estate creditor

The Sherman Estate certainly disputes Laroe's claim of "equitable title" or anything purporting to entitle Laroe to takings damages from the Town. It is true that Laroe paid over $2 million to Sherman in connection with MareBrook. Yet Laroe is one of several Sherman lenders, the largest being TD Bank which foreclosed on and took title to MareBrook and has a claim of well over $5 million filed with the Sherman Estate.

In 2003 Sherman entered a purchase agreement with Laroe where Laroe would pay $6 million in interim payment and $60,000 per lot to Sherman (e.g., $15 million for 250 lots) for MareBrook's development. The Town's obstruction prevented development, making the contract impossible to perform and so void or voidable.[8] Ten years later, around May 2013, when Mr. Sherman was undergoing chemotherapy and soon to die of cancer, Laroe entered into another (purported) agreement (the 2013 Agreement).[9] In the 2013 Agreement, Laroe obtained one single right from Mr. Sherman—the right to take the deed and possession of MareBrook from Mr. Sherman if Laroe paid off TD Bank's mortgage. Laroe declined

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rights cases heard by this Court. *See, e.g., Caruso v. Zugibe*, No. 16-7509 (docketed January 12, 2017).

[8] *See, e.g., 407 E. 61st Garage v Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 296 N.Y.S.2d 338, 244 N.E.2d 37 (1968); 10 N. Y. JUR 2D., *Contracts*, § 384.

[9] The Town and Laroe do not provide these agreements in their Joint Appendix, but the agreements are in the record below.

to do so. Laroe thus waived its recourse, and had no further recourse against Sherman.

At no time did Mr. Sherman ever give Laroe any assignment of rights. The 2003 Agreement is explicit as to this. Mr. Sherman not an agent, partner or joint venturer with Laroe. *See*, 2003 Agreement at ¶ 18(u).[10]

Thus, at most Laroe has a possible monetary claim against the Sherman Estate under the 2003 Agreement, and had the right to have Mr. Sherman tender Laroe a deed if Laroe paid off TD Bank's mortgage, per the 2013 Agreement.

The takings claim against the Town is Sherman's not Laroe's. The Town caused Sherman injury, including the need to seek Laroe's and other lenders' financial help. For this, Mr. Sherman sought a remedy in federal court.

D. Additional Relevant Facts

As relevant to this appeal, this Court can take judicial notice, based upon publicly filed court documents, that Mr. Sherman and then his Estate, represented by the undersigned, has been actively and vigorously representing Mr. Sherman and then the Estate's interest since 2008. The Sherman Estate and the undersigned have at all times been trying to move this case forward as fast and

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[10] The 2003 Agreement, at ¶ 18 (u), explicitly states that the Sherman-Laroe agreement "... does not create any agency relationship, joint venture or partnership, expressly or implicitly, with regard to the acquisition of the Approvals or any subject matter of this Agreement." (*emphasis added*). *See*, *Sherman v. Chester*, 12-cv-00647 Doc. No. 19-5 (SDNY).

efficiently as possible. *Cf., Cert Pet.*, 13a. The Sherman Estate is not "impecunious" or "without funds." *Id.* Its resources, though not unlimited, are sufficient to prosecute the underlying takings litigation against the Town. Laroe's assertions to the contrary are hearsay, disputed and irrelevant to the issue at hand—Laroe's standing.

Second, although Laroe was not clear at the Second Circuit as to its intentions,[11] presently Laroe clearly seeks to recover money for itself directly, and not for the Sherman Estate. Thus, it seeks relief different from Sherman's, namely, relief for itself directly. It essentially seeks to take over the Sherman lawsuit as the real party in interest. Laroe's position is adversarial to Sherman's.[12] Thus, Laroe by necessity will

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[11] *Id.*, at *9a* (and *supra*, note 5).

[12] Because the federal courts are without Article III jurisdiction to adjudicate Laroe's purported claims against Sherman, it is unnecessary for Sherman to devote substantial ink explaining why Laroe has no cognizable "equitable title" takings claim. Otherwise, Sherman could explain in detail why the documents Laroe offers below fail to support its "equitable title" assertions. Why Laroe has no plausible argument that it is a proper party-plaintiff in its own right in the underlying *Sherman v. Town of Chester* lawsuit. Why Laroe could never have filed a takings lawsuit in its own right regarding MareBrook. That Laroe never held title. That it was not an applicant. That it did not do any work, encounter obstruction, or suffer a regulatory "death by a thousand cuts." *Cert Pet.*, 25a. That it never sought the State court review required under *Williamson County*. And that after 2013 it did not exercise its right to pay off TD Bank and take title to MareBrook, where it could have then tried getting its own land use approvals from the Town.

eventually be asking the federal court to decide its rights *vis à vis* Sherman under New York law.[13]

Third, Laroe put in a claim as a creditor of the Sherman Estate. If Laroe believes that Mr. Sherman owes Laroe financial obligations based upon their prior dealings, such as the 2003 Agreement, the appropriate forum for Laroe to seek redress is the New York State Surrogate's Court.

Fourth, Sherman's undersigned counsel has represented Sherman and the Sherman Estate on a largely contingency fee basis, with at least a partial expectation that fees can be recovered against the wrongdoing defendant Town under the fee shifting provisions of 42 U.S.C. § 1988. Yet counsel did not foresee that one of Mr. Sherman's prior business associates would attempt to hijack the lawsuit. Civil rights attorneys will be reluctant to take worthy cases if officious or malicious intermeddlers can intervene and take over.

Finally, the underlying District Court litigation will become inordinately complex, and perhaps severely and unfairly disadvantageous to the Sherman Estate, if an entity claiming an interest but having no standing is permitted either to hijack the lawsuit or otherwise inextricably insert itself into the case. Settlement may become impossible, discovery convoluted, trial unwieldy, and the overall additional expense in time and resources to Sherman, the Town and the Court

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[13] In essence, Laroe's intervention efforts would be akin to a *de facto* third party complaint against the Sherman Estate. There is no Article III jurisdiction present for this.

entirely unnecessary and very burdensome.

ARGUMENT

I.

Rule 24(a)(2) cannot bestow "full party status" upon Laroe, as it lacks standing to sue both the defendant (Town) and the plaintiff (Sherman)

Article III of the Constitution does not permit the federal courts to bestow "full party status" upon a prospective intervenor under F.R.C.P. Rule 24 if the intervenor lacks standing. It does not matter whether the intervention is permissive or by right. The exercise of federal judicial power requires a judiciable controversy—this is jurisdictional and non-waivable. Standing requires a justiciable controversy between the Intervenor and the Defendant, and if there is a controversy between the Intervenor and the Plaintiff, that too must be justiciable. The court below focused *Intervenor vs. Defendant* standing, not *Intervenor vs. Plaintiff* standing. Yet the Question Presented includes both.

Here, Laroe lacks standing in two respects. First, it lacks standing to sue the Town for taking MareBrook. Second, because of Laroe's adversarial posture as to Sherman, Laroe lacks standing to ask the federal court to adjudicate any legal dispute it may have with Sherman.

Laroe is not entitled to full party status on either of these standing grounds. It cannot be granted full party status under Rule 24 because Article III prohibits the exercise of judicial power

in favor of Laroe, because Laroe is not entitled to assert a claim on its own in federal court against either the Town or against Sherman. It has no standing to fight either one in federal court.

However, Rule 24 does not require that "full party status" or federal judicial power be granted to the proposed intervenor. As argued in Point II below, the federal courts can grant intervention (by right or by permission) to a party lacking its own standing, but only if the Intervenor is not bestowed with control of the litigation on the side of the party that the intervenor favors. The intervenor without standing can be assistive but not adversarial to the side supported. It cannot be given full party rights. It can only be allowed to help—given a voice but not a veto. In this manner, the district court's power is exercised only on behalf of the original parties, even though one of those parties now has a helper—the intervenor. This approach effectuates the important goals of Rule 24, while completely honoring the judicial limits imposed by Article III.

With Laroe's help, the Sherman Estate might be better able to prosecute its federal takings case against the Town.[14] But if Laroe is adversarial to

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[14] With non-adversarial assistance, the nature and character of the case will not be altered. Mrs. Sherman will simply have greater resources to fight the defendant Town for the benefit of the Estate and its potential creditors (including Laroe).

In contrast, if Laroe is allowed to become an entirely new party, then an entirely new case has begun (actually two new cases: *Laroe vs. Town* and *Laroe vs. Sherman*.) The Second Circuit would not permit this under its teachings in *Washington Electric,* cited in its decision being challenged here. *See, Washington Elec. Co-op., Inc. v.*

Sherman, it will not qualify for intervention, because absent diversity, Article III does not empower the federal court to entertain what will amount to an *Intervenor vs. Party* lawsuit within the *Plaintiff vs. Defendant* lawsuit.

A. Absent standing, Rule 24 allows an intervenor's voice but not its veto

What F.R.C.P. Rule 24 states on its face, and how the federal courts have interpreted it, are two very different things. On its face, the rule does not explicitly grant an intervenor a status equivalent to that of a party. It does not state that the intervenor becomes a "plaintiff" or a "defendant." It does not provide for the filing of an "intervenor's complaint." *Cf. J.A.* 148 (Laroe's complaint).[15] The statutory language disallows intervention if the existing party can "adequately represent [the prospective intervenor's] interest." This strongly suggests that an intervenor is not entitled to "full party status" absent being able to sue on its own.

A common sense view of Rule 24 intervention that a Congressman or overworked lawyer might find is found on (admittedly non-authoritative) WIKIPEDIA.[16] It describes a view of intervention that makes sense—that intervention allows the

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Massachusetts Mun. Wholesale Elec. Co., 922 F.2d 92, 96–97 (2d Cir. 1990)("Intervenors must take the pleadings in a case as they find them. *** The purpose of the rule allowing intervention is to prevent a multiplicity of suits where common questions of law or fact are involved.")(*emphasis added*).

[15] *See, Washington Electric, supra* ("Intervenors must take the pleadings in a case as they find them.").

[16] *See*, https://en.wikipedia.org/wiki/Intervention_(law).

intervenor a "voice." This Court should agree. It should hold that intervention is not equivalent to a substitution of parties or a consolidation of actions, but rather, that the core purpose of Rule 24 is to allow a person or entity the opportunity to be heard—a voice. The core purpose is not to establish rights as a party, although that may be bestowed if proposed intervenor qualifies for such status because it possesses an independent right to sue. But if the proposed intervenor is without standing, then it cannot be given the full rights of a party, nor given the ability to take control of or hijack a lawsuit from an existing party.

The concept that intervention grants a voice makes sense. Existing federal case law on intervention, however, is often strained in this regard.[17] It is judicial interpretation,[18] not Rule 24's plain text, that has equated intervenor status as "party-plaintiff" or "party—defendant" status. The courts have pigeon-holed "intervenors" as being lumped as either plaintiff or defendant, rather than simply being a "intervenor" or "party-intervenor." The courts have presumed to bestow "party" status upon intervenors, where Rule 24 does not. What the courts should say is: "The voice and status allowed an intervenor depends upon Article III."

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[17] *See, e.g., Cummings v. United States*, 704 F.2d 437, 440 (9th Cir.1983)(intervention of an insurer-subrogee was essentially equivalent to a *pro tanto* substitution of the real party in interest).

[18] *See*, e.g., *U.S. ex rel. Eisenstein v. City of N.Y., N.Y.*, 556 U.S. 928, 933 (2009)("A 'party' to litigation is '[o]ne by or against whom a lawsuit is brought.'").

The Second Circuit was perhaps wise in this regard. Its *Laroe v. Town* decision below does not state that Laroe would be a full-fledged party with the same rights as the Sherman Estate and the Town. Rather, the Second Circuit merely opined that Rule 24:

> "asks only whether the proposed intervenor has an 'interest in the proceeding' that is 'direct, substantial, and legally protectable.'"

Cert Pet., at 16a; 828 F.3d at 69. The Second Circuit did not state what "rights" the federal judiciary would necessarily extend.

As argued at Point II below, this is a view that is consistent with Laroe being permitted to intervene for the purpose of helping recover money for the Sherman Estate (where Laroe filed a claim).[19] It is not consistent with Laroe taking over the takings claim in its own right, by becoming a co-plaintiff (*Laroe vs. Town*) or a *de facto* third party plaintiff (*Laroe vs. Sherman*) while lacking requisite standing to sue on its own.

If Laroe had its own independent takings claim to assert against the Town, it should have commenced its own separate action and then moved to consolidate.[20] It would then become a co-

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[19] This is very consistent with protecting a beneficiary to trust assets, such as the Sherman Estate's assets, as argued in Petitioner's Brief at p. 8-9.

[20] If as Laroe asserts it had contractually obtained basically all of Mr. Sherman's rights in MareBrook, and the Sherman Estate agreed and stipulated to this (it won't), then Laroe could have moved for substitution under F.R.C.P. Rule 25(c). However, any conflict between Laroe and Sherman in this regard could not properly be

plaintiff. Similarly, if Laroe believes it should have held actual title, rather than its undisclosed "equitable title," it could have sued in State court and recovered, for example, a declaratory judgment that it, not Sherman, should be deemed the title owner to MareBrook. Laroe then could have moved to substitute itself for Sherman under F.R.C.P. 25(c), based upon the transferred interest.

Laroe took neither step and thus established no rights. Instead, it takes the role of officious or malicious intermeddler, seeking to hijack a case in which it has no right to belong.

Only if Laroe chooses to become an ally of Sherman, rather than an adversary, and agrees to assist the Sherman Estate in recovering assets for the Estate (with potential benefit to Laroe as an Estate claimant), then there is no dispute, no Laroe-Sherman controversy, and Laroe it should be permitted to help Sherman as a "non-Article III Intervenor. *See*, Point II, below.

B. Lacking its own takings claim and in conflict with Sherman, Laroe has no standing for both reasons

There are two Article III reasons why Laroe cannot be permitted to intervene with full party status. First, for all the reasons stated in the Petitioner Town's merits brief and as further argued below, an intervenor without independent standing to pursue the lawsuit in its own name cannot be bestowed with full party status. The

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resolved in the federal court, as it has no Article III jurisdiction to adjudicate such a "controversy" between these same-state citizens.

burdens placed on the original parties and the federal courts are simply too great, and judicial power under Article III is lacking.

Second, because there is a contentious legal dispute between the proposed Intervenor and the original, the federal court must examine whether it has Article III power to adjudicate such dispute. Here it does not. It has no jurisdiction to do so.

1. *Laroe has no plausible grounds allowing it to sue the Town for its taking of MareBrook*

The Town persuasively argues in its brief why Laroe could not viably sue the Town for a takings, where Laroe was essentially a stranger to the Town. The District Court was correct in this regard. *Cert Pet.*, 53a – 58a.

Laroe cannot plausibly assert that it could ever have sued the Town for its alleged taking of MareBrook. MareBrook was at all relevant times titled in Mr. Sherman's name, and Sherman was never the agent, partner or joint venturer of Laroe. Laroe's rights under the purported 2013 Agreement were limited to paying off TD Bank's mortgage and then taking a deed from Sherman. Laroe did not pay off the TD Bank, and the property was thus lost in foreclosure.

If Laroe had a *bona fide* takings claim, it should have asserted it long ago and then, if it wished, moved to consolidate its lawsuit with Sherman's. *See*, F.R.C.P. 42(a)(2). If Laroe wanted actual title (and responsibility for the Town's tax bills) rather than merely its purported equitable title, it could have sued Sherman for such relief in State court,

obtained title, and then moved for substitution as party plaintiff under F.R.C.P. 25(c). It did not.

Laroe's proposed intervenor's complaint is fatally defective in many respects. The Second Circuit directed the lower court to examine the "equitable title" dispute, as potentially being viable. *Cert Pet.*, 17a. That could be relevant regarding the N.Y.S. Surrogate's Court proceeding. As to an independent takings claim, if Laroe sued rather than moved to intervene in 2014, its 3 years limitations period would have included comparatively nothing, as the *Sherman v. Chester* wrongdoing was almost all before then. Most significantly, Laroe's proposed intervenor's complaint is fatally defective on its face, because it fails to allege *Williamson County* exhaustion, namely, that Laroe first pursued a takings remedy in State court.[21] Laroe did not (and could not).

In sum, Laroe could not sue the Town on its own. Any rights that Laroe believes it may have had against Sherman needed to be resolved, if anywhere, in the New York courts. Laroe has no standing to assert Sherman's takings claim in the federal courts. Thus, Laroe has no right to intervene with full party status.

2. *Laroe cannot sue Sherman in federal court, and so lacks standing to fight Sherman there*

In this case, the Sherman Estate asserts a takings claim for all damages Mr. Sherman suffered at the hands of the Town. Six years after Mr. Sherman first filed suit, in 2014, Laroe

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[21] *See* note 2 *supra* and accompanying text.

appeared on the scene asserting that it is the real party in interest and that it is entitled to essentially all of Sherman's damages. The Sherman Estate vehemently disputes Laroe's claims. Thus, there is a legal controversy. It is essentially a *de facto* third party complaint, *Laroe vs. Sherman*. However, as to such controversy, the federal courts lack power under Article III.

The exercise of Article III power requires that the claim arise under federal law. The Sherman-Laroe agreements and any dispute relating thereto certainly do not involve the same operative facts as Sherman's takings claim. As to their contractual issues, there is no diversity (Laroe and Sherman are both citizens of New York), no federal question and no supplemental jurisdiction.[22] Thus, as between Sherman and Laroe, there is no justiciable Article III "case or controversy." Laroe's contentions are for a New York court to decide, not a federal court. Any Second Circuit instruction suggesting otherwise was error.[23] Laroe has no standing to bring what amounts to a *de facto* third party complaint against Sherman in federal court. Any Laroe-Sherman dispute was and is for New York State court adjudication.

Specifically, Laroe's recourse is in the Surrogate's Court. Apart from the frivolousness of Laroe's "equitable title" assertions, Laroe's own description of its entitlement involves the Sherman-Laroe 2003 Agreement, a (purported)

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[22] *Cf.., Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 371 (1978)(common nucleus of operative facts).

[23] The Second Circuit's ruling need not be read to extend so far. *See*, note 25 *infra*.

rabbinical court arbitration,[24] and the purported 2013 Agreement (executed shortly before Mr. Sherman died, while he was on chemotherapy) wherein Laroe was given the right to take title if it paid off the TD Bank mortgage. None of these Sherman-Laroe contractual issues involve any federal question. These are frivolous claims, but even if plausible, the claims involve complicated factual and State law issues that are exclusively within the province of the State courts to adjudicate, not the federal courts.[25]

Laroe and Sherman are presently adversaries. Laroe wishes to insert itself into the *Sherman v. Town* lawsuit, to take it over. Laroe wants all of any recovery against the Town, and to stiff all of Mr. Sherman's other creditors and heirs in the process. To the extent that Laroe can receive the ear of a court, this will be a nasty fight. It is not a fight that should be allowed in federal court. Laroe's adversarial presence will create a litigation nightmare for Sherman, the Town and any court entertaining the dispute. If Laroe is permitted to pursue its "equitable title" claim in federal court against Sherman, what may follow is mischief like one might expect from a scorned lover

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[24] *Cert Pet.*, at 57a, n. 19.

[25] The Second Circuit directed the lower court to examine Laroe's equitable title assertions. *Cert Pet.*, 17a; 828 F.3d at 70. This could inform the District Court as to whether Laroe has a potentially valid Surrogate's Court claim against Sherman for Rule 24(a)(2) criteria purposes. However, the Second Circuit should not be viewed as directing that the district court adjudicate a State law dispute between Laroe and Sherman. *Id.* This Court should hold that any such adjudication will offend Article III.

desiring palimony being allowed intervention into a husband-wife's matrimonial action.

This Court's response must be clear, by holding that there is no Article III judicial power to adjudicate any Laroe-Sherman dispute. There is no diversity jurisdiction, no federal question, only contract claims totally independent from Sherman's takings claim against the Town.

C. Permitting Laroe "full party status" without standing will impair the original parties' rights and unconstitutionally burden the federal courts

1. *Obstruction of possible settlement, discovery, trial and appeal*

If Laroe, as an intervenor, is allowed full party status it will essentially be allowed to obstruct any settlement that might be negotiated between the Sherman Estate and the Town. It will be able to extort payments that it would not be able to recover on its own, as it could not sue on its own.

It is thus apparent that allowing Laroe full party status will be highly detrimental, and unfairly so, towards both Sherman and the Town. Full party status will allow Laroe to veto any agreement that may be reached between the existing plaintiff and defendant (Sherman and the Town), unless Laroe receives something in return. Laroe will thus be able to obtain proceeds, even though Laroe is entitled to nothing (as its rights are derivative—as a potential creditor of the Sherman Estate). Granting Laroe the rights of a party will grant it the right to be troublesome and a nuisance. Rule 24 is certainly not intended to allow this, and Article III forbids it.

Allowing Laroe full party status will allow it to dictate the course of the federal action. Not only will it be allowed to prevent a settlement between the Sherman and the Town, but it will have the right to engage in discovery, including against Sherman regarding the competing interests. A *Laroe vs. Sherman* adversarial proceeding will arise within the existing federal action. Laroe may demand a trial, where it will ask that the jury decide in favor of Laroe and against Sherman as to damages. If it disagrees with damages being awarded to Sherman, it may join the Town in an appeal. And if Sherman ultimately succeeds in full, the district court will need then to adjudicate whether Sherman should be entitled to all or only a portion of a requested 42 U.S.C. § 1988 fee-shifting award, where the Town will certainly argue that its taxpayers should not be responsible for the *Laroe vs. Sherman* expenditures in the *Sherman vs. Town* case. This Court should view these potentialities as intolerable, and certainly not what is intended by Rule 24 or allowed by Article III.

2. *Allowing an officious or malicious intermeddler full party status will invite the abuse of process*

Laroe stands no differently from any other Sherman creditor, yet it seeks to pursue a direct action against the Town, at the expense of all other *bona fide* Estate creditors and the heirs. Another creditor, and even the widow, could claim "Mr. Sherman promised me the land." Any such claims must be pursued, if anywhere, in State court (e.g., the Surrogate's Court).

Laroe is not a necessary or proper party in federal court. Its motive is ulterior. It knows that its submission to the Surrogate's Court is inferior to the much larger creditor, TD Bank. So Laroe seeks to avoid the Surrogate's Court altogether by intruding directly into the Sherman takings lawsuit, where it hopes to obtain money directly from the Town.

Laroe's efforts to intervene essentially amount to an effort to abuse judicial process. Laroe should know that it has no legal basis for stepping into Mr. Sherman's or his Estate's shoes, yet Laroe is doing so to coerce Mrs. Sherman and the Town into paying it something, or to bamboozle the federal courts into allowing it entry into the courthouse. Yet the proper venue—the only permissible venue—is the New York State Surrogate's Court.

3. *Hindrance of civil rights' objectives of §1983 and §1988*

This is a civil rights action under 42 U.S.C. § 1983. Attorney's fees are recoverable under the fee-shifting provisions of 42 U.S.C. § 1988.

If this Court allows an intervenor to come in with full party status in the circumstances of this case, it will create a tremendous disincentive for plaintiffs' attorneys (such as the undersigned) to become involved in such cases. The record suggests that Laroe seeks to take over the *Sherman v. Town of Chester* case basically in its entirety. What this means is that Sherman's counsel, after 9 years of fighting the wrongdoing Town, now has another lawsuit to simultaneously wage—a "lawsuit within the lawsuit" against Laroe.

Sherman has been proceeding on the basis that the Sherman Estate may be able to recover attorney's fees against the Town after the case is won, as Sherman will then be a "prevailing party." If Laroe remains in the case, however, an unpredictable amount of time—discovery, motions, trial, appeal—may be devoted to fending off Laroe, rather than fighting the defendant Town. Counsel's time should be reimbursed by someone, but the Sherman Estate will have no recourse for attorney's fees against Laroe, and might have none against the Town regarding the efforts employed to oppose Laroe's mischief. If this Court endorses Laroe's mischief, it will create a strong disincentive for attorneys like the undersigned to pursue similar civil rights litigation. Congress certainly did not intend to stifle civil rights actions by approving Rule 24.

II.
Principled Approach to Rule 24—limited "non-Article III intervention"

The Sherman Estate proposes a principled answer to the Question Presented. This Court can honor the language and intent of both Rule 24 and Article III by requiring that the lower courts determine in the first instance whether a proposed intervenor has requisite standing. If it does, and otherwise meets Rule 24's requirements, it can be deemed an intervenor with full party status.

However, if the proposed intervenor (such as Laroe) lacks standing,[26] then the District Court

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[26] Requisite standing may be absent 1) because the person lacks independent standing sufficient bring its own independent lawsuit, or 2) because the person is in

should deem it a "non-Article III Intervenor." This is a limited status indicating that this intervenor does not have the same "full party" rights of Article III-qualified intervenors possessing requisite standing. As a consequence, the non-Article III Intervenor is limited to aiding the party on whose side it intervenes—a voice, not a veto.

Aiding the party it supports is a tool for justice. It is a means by which an intervenor supporting a plaintiff such as Sherman can help "David fight Goliath." This will not offend the Constitution. Rather, it will assist in its promise of "liberty and justice for all."[27] It is an approach that is consistent this Court's holdings in *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 537, 539 (1972)(member allowed participation as long as member sought same relief as the existing plaintiff) and *Diamond v. Charles*, 476 U.S. 54, 68–69 (1986)(intervenor wishing to appeal on its own must satisfy Article III's standing requirements). *Cf., Cert Pet.*, 9a.

Assume *arguendo* that Laroe was the largest potential creditor of the Sherman Estate (*it is not*), and assume *arguendo* that the Sherman Estate

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conflict with the party on whose side the person seeks to intervene, yet lacks diversity of citizenship required by Article III.

[27] "Justice for all" and the right to petition government are overarching principles. These principles are much more important than the Town's argument that Article III should be strictly applied because district court judges are presently overworked. The courts' customers are the citizens of this Nation, and their reliance upon the Constitution and this Court to protect the People, their Rights, and their Democracy.

was impecunious and did not have an attorney to represent it (*not so*). It certainly would seem appropriate to allow Laroe to intervene, and perhaps even intervene "by right," in order to assist the Sherman Estate in recovering money from the Town to create a larger "fund" for the Estate. Such intervention would be in both the Sherman Estate's and Laroe's interest. Yet absent Laroe possessing requisite standing, Sherman must remain the sole quarterback, and Laroe merely a member of the team.

In the present case, if Laroe wishes to help Sherman increase estate assets for the benefit of all creditors and Mr. Sherman's heirs, it should be allowed to do so as a "non-Article III Intervenor."[28] As such, Laroe could help Mrs. Sherman pay for necessary experts, and to the extent Mrs. Sherman consents as plaintiff, Laroe can assist with discovery and assist at trial. But Laroe's participation on behalf of the Sherman Estate requires the Estate's agreement and consent on all scores. Two chefs are not allowed in this kitchen.

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[28] In *United States Postal Serv. v. Brennan*, 579 F.2d 188, 190-92 (2d Cir. 1978), the letter carrier association sought to help the postal service with its litigation. Using Sherman's proposed non-Article III intervenor approach, the District Court could have allowed the union to assist, but not control, the USPS litigation. The District Court had no such Supreme Court guidance, and perhaps as a consequence denied intervention. There, if found no "inadequacy of representation" and observed that the union's involvement might be intrusive to the party plaintiff. Yet if there existed inadequacy of representation or a need for help due to USPS budget cuts, the union should be been allowed to help, but not to hijack.

Laroe cannot engage in "its own" discovery, or control or stymie settlement discussions, or demand a jury trial or possess a right of appeal. The "judicial power" of the United States will, in all respects, be exercised through the party with standing—Mrs. Sherman—not the non-Article III Intervenor, Laroe.[29]

In this manner, Laroe can have a say in protecting its interests through Rule 24 intervention, through helpful, non-adversarial participation for the purpose of increasing Sherman's Surrogate Court fund for eventual Surrogate Court distribution.

Similarly in this regard, the Sherman Estate's largest creditor, TD Bank, might also desire to intervene. It meets the Rule 24(a)(2) and (b)(1(B) criteria. TD Bank's intervention to protect its own interest as an Estate creditor might be welcomed by both the Sherman Estate and Laroe, as its assistance would benefit all Estate creditors. As long as Sherman quarterbacks plaintiff's side of the courtroom, both Rule 24 and Article III will exist in harmony.

This Court has recognized that sometimes an intervenor's rights are hefty, and thus may have "an interest in the subject matter of the litigation similar to that of the original parties." *See, Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 382 n.1 (1987). However, such is not always the case, and certainly is not the case here. Laroe has no rights, other than what it might be

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[29] *See, Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003).

able to claim against the Sherman Estate in the New York State Surrogate's Court. TD Banks interest is much greater than Laroe's.

In sum, granting non-Article III Intervenors the role of helper is fine, but their intervention must be limited to helping. This is basically what intervenors are now granted by courts through permissive intervention under Rule 24(b)(1)(B).[30] Sherman's approach harmonizes the "right to intervene" under the Rule 24(a)(2) criteria with the constraints of Article III. Call it "intervention by right, light."[31] The intervenor by right without standing is permitted a role, but only if helpful—an assistant, not an adversary. Again, a voice, not a veto. This approach allows the intent of Rule 24 to be effectuated without offense to the standing requirements of Article III.

III.
Affirm the District Court

Laroe may argue that the Second Circuit did not expressly rule on whether Laroe possesses standing. However, the record is clear that 1) Laroe does not possess independent standing to sue the Town, and 2) that there is no diversity or supplemental jurisdiction for the district court to adjudicate any Laroe claim

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[30] An permissive intervenor may also have independent standing. Rule 24 distinguishes between a person with a strong interest and a weak interest, and does not expressly bestow "full party status" rights upon either. Intervenor's "rights" should hinge upon standing, not whether entry into the lawsuit is permissive or by right intervention.

[31] This is consistent with the teaching in *Diamond, supra,* that for the intervenor to keep the case alive, as by being the sole party on appeal, Article III standing is required.

against Sherman. Thus, if Laroe asks this Court to direct the Second Circuit to rule on whether Laroe possesses requisite standing, it should decline. Remand to consider standing is unnecessary, will unduly burden the Court of Appeals, and will further delay the Sherman's almost decade long effort to obtain justice. This Court should affirm the District Court.

Conclusion

Under Article III and Rule 24, the federal courts must deny "full party status" to a person or entity such as Laroe without standing, lest the officious intermeddler hijack a lawsuit that is not its own. Laroe had no right, and thus no standing, to pursue a claim against either the Town or Sherman.

However, if Laroe chooses to be a non-adversarial assistant to Sherman, agreeing to help Sherman recover assets for all Estate creditors (including Laroe) without infringing upon Sherman's control of her case, then Laroe should be allowed "non-Article III intervenor" status, whether intervention is permissive or by right.

Respectfully submitted,

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